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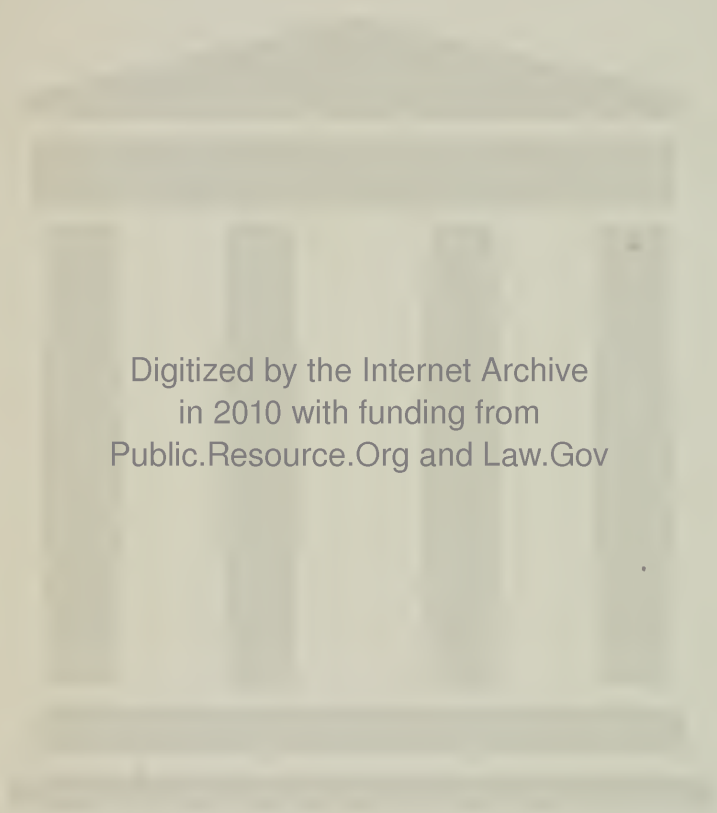
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No. 11239

N. 2440

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOE FONTES, individually and doing business as
JOE FONTES MACHINERY COMPANY,
LTD.,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
MAR 4 1946

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Southern
Division.

No. 24635-G

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

JOE FONTES, individually and doing business as
JOE FONTES MACHINERY COMPANY,
LIMITED,

Defendants.

COMPLAINT FOR INJUNCTION AND
TREBLE DAMAGES

Count One

1. In the judgment of the Price Administrator the defendant has engaged in actions and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2nd Sess., c. 26, 50 U.S.C.A., 901 et seq) as amended, hereinafter called the "Act," in that defendant violated Maximum Price Regulation 1, as amended—Used Machine Tools—effective in accordance with the provisions of the Act; and, therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Regulation.

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act. [1*]

*Page numbering appearing at foot of page of original certified Transcript.

3. At all times mentioned herein there has been in effect pursuant to the Act, Maximum Price Regulation 1, as amended, hereinafter referred to as the "Regulation," establishing maximum prices for used machine tools.

4. At all times hereinafter mentioned defendant has been and now is engaged in business in the City and County of San Francisco, State of California, selling and offering to sell used machine tools for which maximum prices are and were established by said Regulation.

5. During the year last past, defendant sold and offered to sell used machine tools at prices in excess of those established by the Regulation.

Count Two

1. Plaintiff as Administrator, Office of Price Administrator, brings this action for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th cong., 2nd Sess., c. 26, 50 U.S.C.A., Appx. 212), as amended, hereinafter called the "Act."

2. Jurisdiction of this action is conferred upon the Court by Sections 205(e) and 205(c) of the Act.

3. Paragraphs 3, 4 and 5 of Count One are incorporated by reference as if set forth in full herein.

4. None of said purchases was made for use or

consumption other than in the course of trade or business.

5. Plaintiff is informed and believes and therefore alleges that three times the aggregate amount by which the prices received by the defendant in the transactions referred to in Paragraph 5 of Count One exceed the maximum prices provided by Maximum Price Regulation 1, as amended, equals an amount in excess of \$200.00. [2]

Count Three

1. In the judgment of the Price Administrator the defendant has engaged in actions and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Con., 2nd Sess., c. 26, 50 U.S.C.A., 901 et seq) as amended, hereinafter called the "Act," in that defendant violated Maximum Price Regulation 136 (8 F. R. 16132), as amended and revised—Machinery and Transportation Equipment—effective in accordance with the provisions of the Act; and, therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Regulation.

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

3. At all times mentioned herein there has been in effect pursuant to the Act, Maximum Price Regulation 136 (8 F. R. 16132), as amended and revised, hereinafter referred to as the "Regulation,"

establishing maximum prices for machinery and transportation equipment.

4. At all times hereinafter mentioned defendant has been and now is engaged in business in the City and County of San Francisco, State of California, selling and offering to sell machines and parts and machinery services for which maximum prices are and were established by said Regulation.

5. During the year last past, defendant sold and offered to sell machines and parts and machinery services at prices in excess of those established by the Regulation.

Count Four

1. The allegations of paragraphs 1, 2, 3 and 4 of Count Three are incorporated herein as if set forth in full.

2. Defendant violated said Regulation in that he sold and offered to sell second-hand machines and parts without following the pricing practices as required by Section 1390.11 of the Regulation. [3]

Count Five

1. The allegations of paragraphs 1, 2, 3 and 4 of Count Three are incorporated herein as if set forth in full.

2. Defendant violated said Regulation in that he failed to prepare and keep for inspection by the Office of Price Administration, true, full and accurate records as required by Section 1390.26(a)(4) of the Regulation.

Wherefore, The Administrator demands:

1. A permanent and final injunction enjoining the defendant, his officers, agents, employees and attorneys, and all persons in active concert or participation with the defendant, from directly or indirectly selling, delivering or offering for sale or delivery machines and parts and machinery services and second-hand machine tools at prices in excess of those established by Revised Maximum Price Regulation 136 and Maximum Price Regulation 1, as amended, or otherwise violating or attempting or agreeing to do anything in violation of any Regulations or Orders adopted pursuant to the Emergency Price Control Act of 1942, as amended, establishing maximum prices for machines and parts and machinery services.

2. A permanent and final mandatory injunction directing and requiring the defendant, his officers, agents, employees and attorneys, and all persons in active concert or participation with the defendant, to follow the pricing practices as required by Section 12 of Revised Maximum Price Regulation 136.

3. A permanent and final mandatory injunction directing and requiring the defendant, his officers, agents, employees and attorneys, and all persons in active concert or participation with the defendant, to prepare and keep for inspection by the Office of Price Administration, true, full and accurate records as required by Section 20 of Revised Maximum Price Regulation 136, as amended and revised. [4]

4. Judgment on behalf of the United States against defendant in a sum equal to three times the aggregate amount by which the prices received by defendant exceeded the maximum prices provided by Maximum Price Regulation 1, as amended.

5. Such other, further and different relief as to the Court may seem just and proper.

Dated: April 6, 1945.

(Signed) W. H. BRUNNER,

(Signed) RALPH GOLUB,

Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 6, 1945. [5]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Now comes defendant, Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, and for answer to plaintiff's complaint on file herein denies and alleges as follows:

I.

Defendant denies that he has engaged in actions and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2nd [6] Sess., c. 26, 50 U.S.C.A., 901 et seq) as amended, hereinafter called the "Act," in that defendant violated Maximum Price Regulation 1, as amended—Used Machine Tools—effective in accordance with the provisions

of the Act; and, therefore, pursuant to Section 205 (a) of the Act.

II.

Defendant denies all of the allegations contained in paragraph 5, Count One, of said complaint.

III.

Defendant denies all of the allegations contained in paragraph 4, Count One of said complaint, incorporated by reference into paragraph 3, Count Two of said complaint.

IV.

Defendant denies all of the allegations contained in paragraph 5, Count Two of said complaint.

V.

With reference to Count Three, defendant denies that he has engaged in actions and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2nd Sess., c. 26, 50 U.S.C.A., 901 et seq) as amended, hereinafter called the "Act," in that defendant violated Maximum Price Regulation 136 (8 F. R. 16132), as amended and revised—Machinery and Transportation Equipment—effective in accordance with the provisions of the Act.

VI.

Defendant denies all of the allegations contained in paragraph 5, Count Three of said complaint.

VII.

Defendant denies all of the allegations contained in paragraph 2, Count Four of said complaint. [7]

VIII.

Defendant denies all of the allegations contained in paragraph 2, Count Five of said complaint.

Wherefore, said defendant prays to be hence dismissed with his costs.

WALDO F. POSTEL,

Attorney for Defendant. [8]

State of California,

City and County of San Francisco—ss.

Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, being duly sworn, deposes and says: That he is the defendant in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated upon information or belief, and as to those matters he believes it to be true.

JOE FONTES.

Subscribed and sworn to before me this 31st day of May, 1945.

[Seal]

FLORENCE HANEY,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires May 23, 1949.

Receipt of copy of foregoing answer to complaint admitted this 31st day of May, 1945.

W. H. BRUNNER,

RALPH GOLUB,

Attorneys for Plaintiff.

[Endorsed]: Filed May 31, 1945. [9]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

Complaint for Injunction and Treble Damages

Before: Hon. R. Lewis Brown,
Judge.

Tuesday, September 4, 1945

Counsel Appearing: For the Plaintiff: A. O. Jepson, Esq. For the Defendant: Waldo F. Postel, Esq.

The Clerk: Bowles vs. Fontes for trial.

The Court: Proceed.

Mr. Jepson: I wanted to make a stipulation, your Honor, to save time, as to the value of the machine tools, and then there is only one question that remains, and that is the question whether it was guaranteed or unguaranteed. [11]

The Court: Haven't you that stipulation prepared already?

Mr. Jepson: I would like to stipulate, with the permission of Defendant's counsel, that the base price of the machine tool involved, which is one Sebastian lathe with a chuck attached, together with the extras, is \$1,956.

Mr. Postel: That is on the 12 inch lathe. They do not make it 13 inch.

Mr. Jepson: I will withdraw that stipulation, if I may. The plaintiff makes a stipulation with the consent of the defendant that the Sebastian geared head, quick change, lathe, direct motor drive, together with one chuck, has a base price of \$1,945.

Mr. Postel: We accept that stipulation and join in it.

The Court: When you say base price do you mean that is the maximum price at which it could be sold under the regulations?

Mr. Jepson: That is the maximum price under the regulation, this being in Class 4, which classified it as to age, and the age of this machine puts it into Class 4.

The Court: That is the maximum price at which it could be sold?

Mr. Jepson: The maximum price, the ceiling price, would be 70 per cent of that for the guaranteed machine and 45 per cent for the "as is" machine.

The Court: You have not answered my question. Is \$1,945 the maximum price at which it could be sold under the regulation? [12]

Mr. Jepson: No, the maximum price under which it could be sold under the regulation would be 70 per cent of that figure if it carried a guarantee, and if no guarantee, 45 per cent.

Will you take the stand, Mr. Fontes?

JOE FONTES,

called for the plaintiff; sworn.

The Clerk: Q. Please state your name to the Court.

A. Joe Fontes.

(Testimony of Joe Fontes.)

Direct Examination

Mr. Jepson: Q. You are the defendant in this action?

A. Yes, sir.

Q. Under subpoena you were to bring certain records and papers in to this court?

A. Yes. I haven't picked up a subpoena yet, but I have the records.

Q. That have to do with the transaction being the sale of a Sebastian geared head lathe to the Montybex Engineering Company, 1701 Mission Street, San Francisco, California?

A. Yes, sir.

Q. At the time of the sale of that lathe to this company did you or did you not furnish a written guarantee of the satisfactory operation of this lathe for a period of thirty days?

A. At the time that lathe was——

Q. You can answer yes or no.

A. I would like to explain to [13] the Court.

The Court: Answer yes or no and then explain.

The Witness: Did we or did we not serve a written guarantee?

Mr. Jepson: Yes.

The Court: Read the question.

(Question read.)

A. We did not.

The Court: Answer that yes or no.

The Witness: We did not serve a written guarantee. We gave a verbal guarantee.

(Testimony of Joe Fontes.)

The Court: Strike the answer. Answer that question yes or no.

The Witness: Can I explain it?

The Court: Yes, you may explain it after you answer it.

The Witness: No, we did not serve a written guarantee, and I would like to explain it.

The Court: Go right ahead and explain it.

The Witness: At the time that lathe was sold my office man, Mr. Bob Peabody, who made this transaction—I did not make the transaction; it was out of the office in court——

Mr. Jepson: That is objected to.

The Court: It is hearsay. You cannot testify to that if you were not there. Testify to what you know personally.

The Witness: But I made a transaction in that business [14] prior to writing up the order.

The Court: All right, any transaction you had you can testify to.

The Witness: In my transaction with the Monty-bex Company, when I brought that lathe up from Los Angeles, we made a guarantee to the Monty-bex Company that that lathe was guaranteed to be in first class working condition throughout, and if it was not satisfactory they could return it to us.

Mr. Jepson: That is objected to as incompetent, irrelevant and immaterial for the reason that the regulation itself says it must be a written guarantee at the time the sale is made, and the defend-

(Testimony of Joe Fontes.)

ant has testified that there was no written guarantee.

The Court: This is a part of the defendant's explanation. The objection is overruled.

Mr. Jepson: Q. Go ahead.

A. Well, Mr. Montybex said it would be all right if I would guarantee the lathe he would place the order. I was not there to accept the order, so I told Mr. Bob Peabody to write up the order.

The Court: Just a minute. When I tell you to stop, stop.

The Witness: Yes, sir.

The Court: Strike all that part of the answer after "I told Peabody" as being hearsay. You can't testify to [15] something you told somebody else who was not a party to this action, or what somebody told you.

Mr. Postel: If the Court please, I think the witness is not trying to introduce hearsay evidence of what it contains but to tell what he did. In other words, he instructed his employee.

The Court: The Court is not going to consider what he told somebody else or what somebody else told him.

Mr. Postel: No, the question, your Honor, was what did he do.

The Court: That is right.

Mr. Postel: Well, he gave instructions. We are not offering that testimony as to the truth of what he said.

The Court: And it is not going to be received

(Testimony of Joe Fontes.)

no matter on what theory it is offered. It is not going to be received.

The Witness: Can I explain the instructions?

The Court: No, you cannot explain the instructions.

Mr. Jepson: Q. Did you at the time of the sale of that lathe furnish the purchaser with an invoice?

A. Yes.

Q. Have you the copy of that invoice with you?

A. A regular contract. I do not know whether you would call it an invoice. A regular contract.

Mr. Postel: I think you have it, Counsel.

Mr. Jepson: Q. I will hand you that and ask you if that is the contract you refer to?

A. Yes, sir, that is our [16] regular form contract.

Q. That is the original of the contract that was given the purchaser when he bought this machine?

A. Yes, sir.

Mr. Postel: Just a minute, before you answer. I object to that, your Honor, upon the ground the witness testified he was not present at the time the transaction was consummated, that he made the sale, the oral negotiations for the sale of this tool, but the sale itself, together with the delivery of that instrument that he now holds in his hand and the writing of that order was done by somebody else and not in his presence.

The Court: He has identified it as being an original instrument issued in the *court* of his business.

(Testimony of Joe Fontes.)

Mr. Postel: We stipulate that this came out of his shop.

The Court: If that is the case, the objection is overruled.

Mr. Jepson: Q. Is there any place on that instrument or contract that states that the machine is guaranteed in any way for any period of time whatsoever?

Mr. Postel: I object to that. The instrument is the best evidence of what it contains.

The Court: Sustained.

Mr. Jepson: The plaintiff offers in evidence the instrument just testified to by the defendant as an exhibit. [17]

The Court: Admitted.

(The document in question was thereupon received in evidence as Plaintiff's Exhibit 1.)

Mr. Jepson: That is all.

Cross Examination

Mr. Postel: Q. Mr. Fontes, it has been stipulated here in open court that the maximum price for this machine tool was \$1,945, 70 per cent of \$1,945.

A. That is right.

Q. Now, the question is, did you sell it within 70 per cent of that maximum price?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 1 and ask you did you prepare that invoice?

A. No, Mr. Peabody.

(Testimony of Joe Fontes.)

Q. Just answer yes or no. A. No.

Q. You did not. Were you there when it was prepared? A. No.

Q. There is another signature on there, Carl E. Beck.

A. That is the owner. That gentleman is here now to testify.

Q. That is the purchaser's signature, is that correct? A. Yes, sir, that is right.

Mr. Postel: That is all.

Redirect Examination

Mr. Jepson: Q. Mr. Fontes, what did you sell that machine for?

A. What did we sell it for?

Q. Yes. A. At \$1,200.

Q. And that included the chuck.

A. That included the chuck, yes, sir. [18]

Q. Did it include extras that were on it?

A. Motor and switch.

Q. How did you arrive at that price?

A. By taking the OPA book.

Q. Which book?

A. The price book there, this here book, the OPA—the new price book.

Q. What page did you find that on?

A. Page 362.

Q. Will you turn to Page 362 and explain to the Court how you arrived at the price of \$1,200?

The Court: You can just keep your seat. What was that page number?

(Testimony of Joe Fontes.)

A. 362.

Mr. Jepson: Q. Will you just explain how you arrived at the price of \$1,200?

A. Well, it says here, as I said before—can I explain now without any—

The Court: Yes, he asked you how you arrived at the price. Go ahead and tell him how you arrived at the price.

The Witness: We sold a 13 inch by 6 foot Sebastian lathe. Sebastian do not make the 13 inch size any more. They do make a 12 and a 14. So we took the lesser of the two as a comparable size and went by the 12 inch lathe. According to the OPA book, on Page 362, the 12 by 4 Sebastian lathe sells for \$1,795, and they allow one to add \$80 for two feet of additional bed. In that we are also allowed by the OPA regulations to charge for extras. There is an extra here of a 4-jaw chuck that sells for \$71 and \$10 for the back plate that fits on the spinner, making it \$81 complete. Those added [19] together—I do not have the figures here—but I had it added up there—from that we take 70 per cent. That comes to a little over \$1,300. I do not know exactly how much. But we put a price of \$1,200 because it has been the policy of the company to sell always under the ceiling price. But \$1,200 is ample for a lathe of that size.

Q. How old was this machine?

A. Well, we put it in Class 4 because we did not know the exact age, and at the time we made the sale we did not have time to stipulate with the

(Testimony of Joe Fontes.)

factory the exact date, so we put it in Class 4. It may be anything from 15 to 25 years. I don't know.

Q. And Class 4 provides for 70 per cent if the machine is rebuilt and guaranteed and 45 per cent if it is other condition, is that right?

A. That is right, if it is equivalent to rebuilt and guaranteed or if it is in other condition, yes.

Mr. Jepson: I object to the statement to it being equivalent to that.

The Witness: Your book says so.

The Court: Overruled.

Mr. Jepson: Q. So you arrived at what base price then?

A. The total of these figures and 70 per cent of that.

Q. But \$1,945 is the base price that you sent in on Form 1, is that right?

A. Yes, we sent in a form to the OPA stating on the form—we put on the form “Guaranteed,” if [20] you will look at the form.

Q. And you sold it there for \$1,200?

A. \$1,200.

Mr. Jepson: That is all.

Mr. Postel: May I see that form that has just been referred to?

Mr. Jepson: Q. In the interest of time will you show me on this OPA form: one, where it mentions “guaranteed?”

A. In these brackets down here, the X.

Mr. Postel: You have already seen this, Counsel.

(Testimony of Joe Fontes.)

Recross Examination

Mr. Postel: Q. Did you bring this document to the court?

A. No, that is OPA files.

Q. This document came from your office?

A. Yes, sir.

Q. It shows the particular sale and transactions of this Sebastian lathe?

A. By the same man, yes.

Q. It shows on this report in item No. 7 that it is a rebuilt and guaranteed machine, is that correct?

A. That is right.

Mr. Postel: Now, your Honor, I offer this form in evidence, OPA Form 100:1, secondhand machine tool report.

The Court: It will be denied at this time as anticipatory of the defense. If you desire to renew your offer at the time you put on your defense you may do so.

Mr. Jepson: That is all.

Mr. Postel: Just one other question.

Q. Did you instruct your employees, particularly Mr. Peabody, [21] to make any notations on invoices as to whether or not the machine tool was "as is" or guaranteed?

A. Yes, I did.

Q. What—

A. I have told them all to make sure.

Mr. Postel: That is all.

Mr. Jepson: Q. Does that invoice use the word "guaranteed" on it?

(Testimony of Joe Fontes.)

Mr. Postel: The same objection. It speaks for itself.

The Court: The invoice is a paper, Counsel. It speaks for itself.

Mr. Jepson: That is all.

The Witness: I would like to explain to the Court.

The Court: That is all. Step down.

Mr. Jepson: That is the plaintiff's case, your Honor.

(The defendant resumed the stand.)

Mr. Postel: Shall I proceed, your Honor? I was going to make a motion for a non suit on this, but if the Court wants all the facts—I do not quite understand the theory of the plaintiff's case in this matter. Is it because an employee has failed to make a certain notation on a form? Is that the whole question involved?

The Court: Of course, the procedure is up to you as to whether you desire to make a motion for a non suit or intend to proceed.

Mr. Postel: Well, I had better proceed. I do not want to jeopardize the interests of my client in this matter. [22]

The Court: All right, you may proceed, Counsel.

Mr. Postel: Q. Mr. Fontes, I show you a document, which was brought into court by Counsel for the plaintiff in this case, being OPA Form 100:1, entitled "Secondhand Machine Tool Report," with the signature, "R. A. Peabody, Sales Manager,"

(Testimony of Joe Fontes.)

and ask you is that the report you made to the OPA of this particular transaction?

A. Yes, sir.

Q. At the time that report was sent in was it in the same condition as it is today, Item 7, reporting the sale as a rebuilt and guaranteed sale?

A. That is right.

Mr. Postel: I offer this in evidence, your Honor.

The Court: It is admitted.

(The document in question was thereupon received in evidence as Defendant's Exhibit A.)

Mr. Postel: Q. Now, Mr. Fontes, I show you a pad of invoice, somewhat similar but not exactly similar to Plaintiff's Exhibit 1, and ask you is this the form you are now using in making the sales of guaranteed machine tools regulated by OPA prices?

Mr. Jepson: That is objected to.

The Court: Overruled. He is asking him a question now that the witness can answer yes or no.

A. Yes, this is the form we are now using.

Mr. Postel: That form is different from the one just showed you that was offered in evidence by the plaintiff? [23] Yes or no.

A. Yes, it is different.

Q. Were any changes made in the form suggested by counsel for the OPA, the pad of forms you have in your hand?

A. Yes.

Q. Were these suggestions made after this transaction now before the court was investigated by the OPA?

A. Yes.

(Testimony of Joe Fontes.)

Q. And was the language of that form suggested by the OPA? A. Yes, this one line.

Mr. Postel: I offer this in evidence and read this one line: "All machine tools above described are equivalent to rebuilt and are guaranteed in accordance with OPA regulations unless otherwise specified 'as is.' " I offer this pad in evidence, your Honor.

The Court: Q. Are all the forms similar on that pad?

A. Yes.

Mr. Postel: They are numbered from 1079 to 1100, inclusive.

The Court: If you offer just one form it will meet the same purpose for the record.

Mr. Postel: I offer the form No. 1079.

The Court: It will be admitted.

(The document was thereupon received in evidence as Defendant's Exhibit B.)

Mr. Postel: I think that is all.

Mr. Jepson: No cross-examination. [24]

CARL BECK,

called for the defendant; sworn.

The Clerk: Q. Please state your name to the Court.

A. Carl Beck.

(Testimony of Carl Beck.)

Direct Examination

Mr. Postel: Q. What is your business, Mr. Beck?

A. Machine shop owner.

Q. In San Francisco? A. Yes.

Q. How long have you been in that business?

A. Almost two years.

Q. Do you know Joe Fontes, the witness who just left the stand? A. Yes, sir.

Q. Do you know that he is in the used machine tool business? Is that correct? A. Yes.

Q. You have a machine shop?

A. Yes, sir.

Q. You and your partner? A. Yes, sir.

Q. You heard his testimony; you have been in court right along, have you not? A. Yes, sir.

Q. Are you the gentleman or one of the parties who bought this Sebastian lathe from Joe Fontes' machine company? A. Yes, sir.

Q. I will show you Plaintiff's Exhibit No. 1, the invoice with the name, "Carl E. Beck" on here. Is that your signature? A. That is right. [25]

Q. You were the folks who purchased this machine tool? A. That is right.

Q. Do you remember what you paid for it?

A. \$1,200.

Q. Was this machine sold to you by the defendant in this action as a guaranteed or as an "as is" machine? A. Guaranteed.

Mr. Postel: That is all.

(Testimony of Carl Beck.)

Cross Examination

Mr. Jepson: Q. Is your name Mr. Beck?

A. Yes, sir.

Q. Was that guarantee that you got on that machine in writing? A. No, that was verbally.

Q. When did he give you the verbal guarantee? A. At the time we bought it.

Q. Was it invoiced to you as rebuilt?

Mr. Postel: I object to that. The invoice is in evidence.

The Court: Sustained. The invoice speaks for itself.

Mr. Jepson: Q. You received no written guarantee at any time from Mr. Fontes on that machine?

A. Not that I can remember. I did not take care of the books in it at all. My other partner took care of that. I just remember the sale.

Q. There was nothing said between you and Mr. Fontes in regard to a written guarantee?

A. Not that I remember.

Q. You never asked for one? A. No.

Mr. Jepson: That is all. [26]

Redirect Examination

Mr. Postel: Q. Is it a fact that after the machine was purchased and delivered to you and being used by you, you had a part replaced by Fontes?

A. Yes.

Q. What part?

A. We had three parts replaced.

Q. Any additional charge for them?

(Testimony of Carl Beck.)

A. No, sir.

Q. And that is the same practice in the case of a guaranteed machine, is that right?

A. Yes, sir.

Q. If a machine is sold as is you would have to pay for those extra parts, would you not?

A. Yes, sir.

Mr. Postel: That is all, your Honor.

The Court: Step down.

Mr. Jepson: That is all.

The Court: Proceed, gentlemen.

Mr. Jepson: That is all, the plaintiff rests.

Mr. Postel: We rest. Submitted, your Honor, so far as the defendant is concerned.

Mr. Jepson: I would like to make a short argument, if I may.

The Court: All right.

(Counsel for the respective parties then presented their closing arguments, after which the matter was submitted.)

CERTIFICATE OF REPORTER

I, J. J. Sweeney, Official Reporter, certify that the foregoing 17 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

J. J. SWEENEY.

[Endorsed]: Filed Sept. 4, 1945. [27]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 8th day of September, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable R. Lewis Brown,
District Judge.

[Title of Cause.]

This case heretofore having been submitted to the Court for consideration and decision, it is Ordered, in accordance with findings and judgment entered and filed this day, that plaintiff do have and recover from defendant the sum of \$974.25, together with costs. [28]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly to be heard before the Court on the 4th day of September, 1945, Honorable R. Lewis Brown, Judge presiding, sitting without a jury. The plaintiff was represented by his counsel, A. O. Jepson, and the defendant, Joe Fontes, was present in person and represented by

his counsel, Waldo F. Postel. Thereupon oral and documentary evidence was introduced by and on behalf of each of the parties to the action and at the close of all of the evidence the cause was argued by the respective counsel to the Court and thereupon submitted to the Court for consideration and decision, and the Court having considered all of the evidence introduced and the arguments of counsel and being fully advised in the premises now makes and orders filed the following Findings of [29] Fact and Conclusions of Law, viz:

FINDINGS OF FACT

I.

That the defendant, during the times mentioned in the complaint, was engaged in business in the city and county of San Francisco, State of California, selling and offering to sell used machine tools to purchasers purchasing them in the course of trade or business.

II.

That during the times mentioned in the complaint, Maximum Price Regulation No. 1, issued by the Administrator of the Office of Price Administration on the 20th day of July, 1943, and effective July 26, 1943, and establishing maximum prices for the sale of second hand machine tools and extras, was in full force and effect.

III.

That on the 6th day of April, 1944, the defend-

ant offered to sell, and did sell for the sum of \$1200.00, one 13" x 6' Sebastian Geared Head, Quick Change Lathe and one chuck; that the said lathe and chuck, so offered for sale and sold by the defendant, was a second hand machine tool and the conditions of its said sale and the maximum price at which it could be sold were, at the time of said sale, controlled and regulated by said Maximum Price Regulation No. 1 hereinabove referred to.

IV.

That at the time of said sale as aforesaid, the base price of the said lathe and chuck so sold was the sum of \$1945.00.

V.

That at the time of the sale and delivery of the said lathe the same was not rebuilt by the defendant within the meaning of that term as used in Section 3-c) of said Maximum Price Regulation No. 1, and was not invoiced as such, and that no binding written guarantee [30] of satisfactory performance for a period of not less than thirty days from the date of shipment, or no written guarantee of any kind guaranteeing performance for any number of days from date of shipment, was executed and delivered by the defendant to the purchaser of said lathe.

VI.

That the sum of \$1200.00, charged and received by the said defendant for said lathe and chuck from said purchaser, was more than 45% of the base price of the said lathe and chuck, the sum of \$1945.00.

VII.

That at the time of the sale and delivery of the said lathe and chuck to the purchaser, the defendant gave to the purchaser a verbal guarantee of performance and thereafter observed said guarantee by repairing at his own cost and expense the said lathe at the request of the purchaser.

VIII.

That the maximum price the defendant was permitted to receive for the said lathe and chuck, upon the sale thereof, the same being not rebuilt and with a written guarantee, was the sum of \$875.25.

IX.

There is no evidence that the defendant sold or offered to sell any used machine tools at prices in excess of those fixed by the regulation, except the one machine tool hereinabove described in these Findings of Fact.

X.

That the defendant has not engaged in any actions or practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 other than in connection with the sale of the one machine tool described in these Findings.

XI.

There is no evidence that the defendant violated the regulation in that he sold and offered to sell second hand machines and parts [31] without following the pricing practices as required by Section

1390.11 of the Regulation, except for the sale of the one machine tool hereinabove described.

XII.

The allegations of Paragraph 2, Count Five of the Complaint are not sustained by the evidence.

XIII.

That prior to the trial of this action the defendant, in consultation with and at the consent of agents of the plaintiff and of the Office of Price Administration, adopted and is using now in his business a form of invoice and written guarantee approved by the agents of the plaintiff and of the Office of Price Administration to obviate any further violations.

XIV.

That there is no evidence that the defendant has violated the Regulations in any respect except in the one instance in the sale of the one machine tool, and there is no evidence that the defendant has threatened to or intends or will in the future violate the regulations of the plaintiff or of the Office of Price Administration.

From the foregoing Findings of Fact the Court draws the following

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction hereof.

II.

That the plaintiff is entitled to a judgment against

the defendant in three times the amount of \$324.75, the excess charged and received by the defendant over the maximum price fixed for the sale of the said machine tool and part without a written guarantee therefor.

III.

That the plaintiff is not entitled to a decree of permanent and final injunction or of any injunction whatsoever against this defendant as prayed for in his complaint.

Done and dated this 8th day of September, 1945.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Sept. 8, 1945. [32]

In the United States District Court for the Northern District of California, Southern Division.

No. 24635-G

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

JOE FONTES, individually and doing business as
JOE FONTES MACHINERY COMPANY,
LIMITED,

Defendant.

JUDGMENT

This cause came on regularly to be heard before the Court on the 4th day of September, 1945, the

Honorable R. Lewis Brown, Judge presiding, without a jury. The plaintiff was represented by his counsel, A. O. Jepson, and the defendant, Joe Fontes, was present in person and represented by his counsel, Waldo F. Postel. Thereupon oral and documentary evidence was introduced by and on behalf of each of the parties to the action and at the close of all of the evidence the cause was argued to the Court by counsel for the respective parties and at the close of the argument the same was submitted to the Court for consideration and decision and the Court having fully considered the same and being fully advised in the premises thereafter made, signed and ordered filed its Findings of Fact and Conclusions of Law, which said Findings of Fact and Conclusions of Law, so made and filed as aforesaid, are hereby referred to and by such reference made a part [33] hereof.

Wherefore, by reason of the law and the evidence and the premises and the Findings of Fact and Conclusions of Law of the Court, It Is Ordered and Adjudged and this does order and adjudge that the plaintiff, Chester Bowles, Administrator, Office of Price Administration, do have and recover of and from the defendant, Joe Fontes, individually and doing business as Joe Fontes Machinery Company Limited, the sum of Nine Hundred Seventy-four and 25/100 Dollars (\$974.25), together with plaintiff's costs and disbursements herein taxed in the sum of

Done and dated this 8 day of September, 1945.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Sept. 8, 1945. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
CIRCUIT COURT OF APPEALS, NINTH
JUDICIAL CIRCUIT.

Notice Is Hereby Given that Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Judicial Circuit from the final judgment entered in the above-entitled action on the 8th day of September, 1945.

WALDO F. POSTEL,

Attorney for appellant, Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited.

[Endorsed]: Filed Oct. 5, 1945. [35]

[Title of District Court and Cause.]

DESIGNATION OF RECORD DESIRED
ON APPEAL

To C. W. Calbreath, Clerk of the District Court of the United States in and for the Northern District of California, Southern Division.

The defendant above-named, to-wit: Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, in compliance with Rule 75 of the Federal Rules of Civil Procedure, hereby and herein designates the entire record in the above entitled cause as a record on appeal in the Circuit Court of Appeals for the Ninth Circuit.

Please certify to the Circuit Court of Appeals for the Ninth Circuit the following papers and documents:

1. The original Reporter's transcript of testimony. [36]
2. All original exhibits.
3. Original complaint.
4. Original answer of defendant to plaintiff's complaint.
5. Order for judgment in favor of plaintiff and against defendant.
6. Order for entry of judgment.
7. Findings of fact and conclusions of law.
8. Final judgment in favor of plaintiff and against defendant.

9. Notice of appeal.

Dated at San Francisco, California, this 8th day of October, 1945.

WALDO F. POSTEL,
Attorney for defendant and appellant, Joe Fontes,
individually and doing business as Joe Fontes
Machinery Company, Limited.

Receipt of copy of the foregoing designation of
record desired on appeal admitted this day of
October, 1945.

W. H. BRUNNER,
RALPH GOLUB,
A. O. JEPSON,
Attorneys for Plaintiff.
By R. BINGHAM.

[Endorsed]: Filed Oct. 8, 1945. [37]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the Appellant herein
may have to and including December 24, 1945, to
file the Record on Appeal in the United States Cir-
cuit Court of Appeals in and for the Ninth Circuit.

Dated: November 14, 1945.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Nov. 14, 1945. [38]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including January 3, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: December 22, 1945.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Dec. 24, 1945. [39]

In the United States Circuit Court of Appeals,
Ninth Judicial Circuit

No. 24635-G

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

JOE FONTES, individually and doing business as
JOE FONTES MACHINERY COMPANY,
LIMITED,

Defendant.

PETITION FOR ORDER EXTENDING TIME
TO FILE TRANSCRIPT OF RECORD ON
APPEAL.

The petition of Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Limited, respectively shows:

That your petitioner is appellant in the above-entitled matter and has appealed from a judgment of the District Court of the United States in and for the Northern District of California, Southern Division.

Petitioner alleges that the time within which to file transcript of record on appeal herein expires after the third day [40] of January, 1946.

Petitioner, in support of this application, files herewith the affidavit of Waldo F. Postel, setting forth the reasons for this application.

Wherefore, petitioner prays that an order be made herein extending the time within which appellant may file transcript of record on appeal after the third day of January, 1946.

WALDO F. POSTEL,

Attorney for appellant, Joe Fontes, individually
and doing business as Joe Fontes Machinery
Company, Limited.

Ordered time to file record and docket said cause
extended to Jan. 31, 1946.

(Signed) FRANCIS A. GARRECHT,
Senior U. S. Circuit Judge.

[Endorsed]: Filed January 9, 1946, Paul P.
O'Brien, Clerk.

A True Copy. Attest:

[Seal] PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Jan. 3, 1946. C. W. Cal-
breath, Clerk. [41]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 41 pages, numbered from 1 to 41, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Chester Bowles, Administrator, Office of Price Administration, vs. Joe Fontes, dba Joe Fontes Machinery Co. No. 24635-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$6.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 17th day of January, A. D. 1946.

[Seal]

C. W. CALBREATH,
Clerk.

(Signed)

E. H. NORMAN,
Deputy Clerk. [42]

[Endorsed]: No. 11239. United States Circuit Court of Appeals for the Ninth Circuit. Joe Fontes, individually and doing business as Joe Fontes Machinery Company, Ltd., Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 25, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11239

JOE FONTES, individually and doing business as
JOE FONTES MACHINERY COMPANY,
LIMITED,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

STATEMENT OF POINTS

Appellant intends to rely on appeal upon the following points. It was not contemplated, nor is it

equitable, that the Emergency Price Control Act of 1942, or Maximum Price Regulation (1) as amended—Used Machine Tools, should be so construed that a dealer complying as far as he physically can with all laws, rules and regulations involved, should be penalized because of the failure of an employee, upon the sale of a machine tool and after definite instructions so to do, failed to write the word “guaranteed” on the invoice covering the sale of a single machine tool, the said dealer being engaged in the business of selling and offering to sell used machine tools and it being admitted by the findings and the judgment that there were no other violations.

It appears from the evidence that the machine tool involved was orally and verbally guaranteed by the seller, the appellant, that the purchaser purchased the same as a guaranteed tool, that the employee of appellant was instructed to write the word “guaranteed” on the invoice and that the purchaser actually received free service or replacements customarily allowed in the trade upon the sale of guaranteed machine tools and not customarily allowed upon the sale of machine tools “as is,” as distinguished from “guaranteed.”

In view of the fact that appellant did not personally fill out the invoice or deliver it to the buyer, that the buyer purchased the said tool as guaranteed and enjoyed the benefits accruing to such guarantee and the fact that the appellant, after the sale, reported the said sale to the Office of Price Admin-

istration on the form provided by said Office of Price Administration, as a sale of a "guaranteed" tool, no judgment should have been rendered against him.

There is no vestige of any intent on the part of appellant to violate any provision of the laws or regulations involved. The evidence is to the contrary.

The District Court Judge erred in giving judgment to appellee in the amount of \$974.25 or in any sum whatsoever. Judgment should have been rendered for appellant.

WALDO F. POSTEL,
Attorney for Appellant.

Service of copy of this designation acknowledged this 25th day of January, 1946.

HERBERT H. BENT,
Attorney for Appellee.

[Endorsed]: Filed January 26, 1946. Paul P. O'Brien, Clerk.

No. 11,239

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE FONTES, individually and doing business as Joe Fontes Machinery Company, Ltd.,

Appellant,

VS.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

WALDO F. POSTEL,

Kohl Building, San Francisco 4, California,

Attorney for Appellant.

FILED

MAR 28 1946

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOE FONTES, individually and doing business as Joe Fontes Machinery Company, Ltd.,

Appellant,

VS.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

I.

JURISDICTION.

The Price Administrator instituted this suit in the District Court pursuant to Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2nd Sess., c. 26, 50 U.S.C.A., 901 et seq.) as amended, hereinafter called the "Act," claiming the violation by defendant of Maximum Price Regulation 1, as amended—Used Machine Tools—effective in accordance with the provisions of the Act; and pursuant

to Section 205(a) of the Act and brought the action to enforce compliance with said Regulation (R-2). An injunction was prayed for but not granted.

Jurisdiction of the District Court was properly exercised under Section 205(c) of the Act.

The judgment of the District Court was entered September 8, 1945 (R-34). Notice of appeal was filed October 5, 1945 (R-34). This Court has jurisdiction of the appeal by virtue of Section 128 of the Judicial Code. (28 U.S.C., Sec. 225, 36 Stat. 1134.)

II.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED ON APPEAL.

A. Statement of the Case.

At all times involved appellant was engaged in selling and offering to sell used machine tools in the City and County of San Francisco, State of California. On April 6, 1944, appellant received an order from a customer for one 13" x 6" Sebastian Geared Head, Quick Change Lathe and one chuck. Appellant was not in actual possession of the said lathe at the time of the order therefor, but same was inventoried in his shop April 17, 1944. The lathe was orally guaranteed by appellant, and, purchased by the customer as so guaranteed. Appellant had instructed the employee handling such transactions or sales to write the words "as is" or "guaranteed", as the case might be, on all invoices. The employee neglected to endorse the word

“guaranteed” on the order for this particular lathe. There is no evidence of any invoice having been issued. Defendant has complied with all provisions of the Act and all Regulations issued in pursuance thereof with the exception of this single instance. After sale and delivery, the lathe was serviced without charge as is the trade usage on a rebuilt and guaranteed tool.

On the day after the lathe was inventoried as being in possession of appellant, appellant made a written report of the sale of said tool (Defendant’s Exhibit “A” R-22) to the Administrator as having been sold as a “rebuilt and guaranteed machine”. When the attention of appellant was called to this single omission of his employee, appellant, at the suggestion of the agent or representative of the Price Administrator, reprinted his forms so that the same mistake could not occur again. (Defendant’s Exhibit “B” R-23.)

The whole case is based upon the alleged failure to give a written guarantee. The objection runs to the procedure involved rather than to the price charged. Had the guarantee been written instead of oral, there would have been no complaint. In other words, the price charged was right.

The Court rendered a judgment against appellant for treble damages.

B. Questions Involved on Appeal.

The questions involved on this appeal are:

1. Before the plaintiff Administrator could recover a judgment, must there not be both proof and a find-

ing that the lathe was purchased for use or consumption in the course of trade or business of the buyer? Must not the Administrator bring his case within the provisions of Section 205-e of the Act?

2. Should appellant, who acted in good faith and did everything a reasonable man could do to comply with the Act and Regulations, who actually did not sell above the legal price and who immediately reported in writing the lathe as having been sold as a rebuilt and guaranteed tool and who actually serviced the lathe without charge as is customary in the sale of guaranteed machine tools, be penalized or, in fact, suffer any judgment against him because of the failure of an employee to write the word "guaranteed" on the purchase order despite explicit instructions by appellant to do so?

3. How could the Court find (R-29) that the lathe was not rebuilt by appellant within the meaning of that term as used in Section 3(c) of said Maximum Price Regulation No. 1 when there was no evidence as to whether or not the machine was rebuilt?

4. How could the Court find that the lathe "was not invoiced" as such when there was no evidence that there was or was not an invoice?

III.

SPECIFICATIONS OF ERROR.

Appellant specifies the following errors upon which he relies in the prosecution of this appeal.

1. The Court erred in giving any judgment in favor of the Administrator.

2. The Court erred in rendering judgment against appellant in the sum of \$927.25 three times the amount of \$324.75, the latter sum being claimed the amount of the overcharge for the lathe.

3. The Court erred in finding that the said lathe was not rebuilt within the meaning of the term as used in the Regulation.

4. The Court erred in finding that the lathe was not invoiced as rebuilt.

5. The Administrator was not entitled to a judgment because there was a failure to produce any evidence that the lathe was purchased for use or consumption in the course of trade or business of the buyer.

6. The Administrator was not entitled to a judgment because there was a failure to make a finding to the effect that the lathe was purchased for use or consumption in the course of trade or business of the buyer.

IV.

SUMMARY OF ARGUMENT.

Before the Administrator could have recovered a judgment in this case he should have presented proof that the lathe was purchased for use or consumption in the course of trade or business of the buyer. There must likewise be a finding as to this.

Appellant, in the conduct of his business, has complied with the Act and all Regulations issued in regard thereto. There is no evidence of the absence of good faith. Appellant has been penalized for an act of omission upon the part of an employee contrary to expressed instructions. It is contended that it was not contemplated by the Congress of the United States that one should suffer a judgment or be penalized unless there was a deliberate act of omission or some intent to deceive, defraud or to evade or unless there was an actual overcharge. Certainly, it could not have been the intention to penalize one for a ministerial error when the price itself was right. The evidence is that the lathe was guaranteed, that appellant believed all regulations had been complied with and actually serviced the lathe after the sale as is customary in the case of guaranteed tools. Furthermore, appellant, the very next day after the machine was inventoried as being in his shop, reported the sale to the Price Administrator as a sale of a rebuilt and guaranteed tool. No judgment should have been rendered against him. The full spirit of the law was obeyed. The purchaser suffered no loss and the appellant had no illegal profit.

As the price was correct, the public suffered no wrong or damage.

The Court made findings which are not supported by the evidence. The Court found that the lathe was not rebuilt. How could the Court make this finding? There is not a scintilla of evidence on that subject.

The Court found that the lathe was not invoiced as a rebuilt and guaranteed machine. This finding is erroneous as there is no evidence as to whether or not there was any invoice.

It is elementary that the burden of proof is upon the plaintiff to prove his case. This is especially true in cases involving penalties or in statutes of a penal nature. The appellee in this case, failed to make sufficient proof. Important elements of his case are missing. Furthermore, neither the evidence nor the findings show a right of action in favor of the Administrator.

V.

ARGUMENT.

A. THE PURPOSES OF THE ACT WERE FULFILLED.

What was the purpose of the Act as applied to this particular transaction? The Act was passed, among other reasons "to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices" etc. (50 U.S.C.A., Sec. 901.) In the case now before the Court there was no excessive price. The price charged was the proper price for a rebuilt

and guaranteed tool, which it was. The sole point was the failure of an employee to write the word "guaranteed". The machine, in fact, was guaranteed and so accepted by the buyer. The price charged was proper for such a tool. The purposes of the Act were fulfilled.

B. THERE WAS AN ABSOLUTE FAILURE OF THE EVIDENCE TO SHOW ANY RIGHT IN THE ADMINISTRATOR TO BRING THIS ACTION.

Section 205-e of the Act reads in part as follows:

"If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or prices, the person who buys such commodity for use or consumption other than in the course of trade or business, may bring an action either for \$50.00 or for treble the amount by which the consideration exceeded the applicable maximum price whichever is greater." * * *

"If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices and the buyer is not entitled to bring suit or action under this Section, the Administrator may bring such action." * * *

Emergency Price Control Act of 1942, 56 United States Statutes at Large, p. 23, 50 U.S.C.A., Sec. 901.

There is no evidence on this subject whatsoever. In other words, there was no evidence showing the pur-

pose for which the tool was purchased. Furthermore, there was no finding as to the purpose for which the tool was purchased and, therefore, both evidence and findings fail to show any right in the Administrator to bring the action. The evidence and the findings should both show that the buyer was not entitled to bring the action.

Even if facts are agreed to by the parties the Court is not relieved from making findings on all material matters upon which the judgment is to be predicated.

“The circuit court of appeals is, of course, not bound by findings which are conclusions of law rather than of fact, and accordingly findings based on facts which are not in dispute, or which are agreed to by the parties, present questions of law proper for the determination of the appellate court unhampered by the trial court’s conclusions. So also the appellate court will always review to determine whether the findings made support the judgment rendered, or the ultimate conclusion drawn; and it may also pass on the propriety of conclusions or ultimate findings of fact which have been reached by way of deduction or inference from probative or subordinate facts.”

36 *Corpus Juris Secundum*, p. 414.

Generally speaking there must be evidence to support any finding made by the Court.

“There is a total lack of evidence or stipulation to support the findings made by the trial court. We deem it unnecessary to consider the other points raised by appellants.

The judgment is reversed.”

Motion Pict. Assn. v. Assoc. Artists, 11 Cal. App. (2d) 320, 321.

The following language is adopted by the Court in the case of *Bowles v. Whayne* (60 F. Supp. 78):

“Where a retailer sells to a purchaser for use or consumption, the purchaser can sue for the damage authorized by the Act, but where a wholesaler sells to a retailer who buys for resale in the course of trade or business and not for use or consumption, such retailer has no authority to institute the suit but the right of action in such cases is vested in the Administrator.”

Naturally, the reverse is true.

C. FINDINGS SHOULD BE MADE ON ALL MATTERS UPON WHICH THE JUDGMENT IS PREDICATED.

Rule 52 of the Rules of Civil Procedure for the District Courts of the United States reads as follows:

“(a) *Effect*. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard

shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

D. APPELLANT SHOWED THE UTMOST GOOD FAITH.

While it is true that in cases of price violation, good faith is not an issue or perhaps material, yet, in this case where there was no actual price violation and where the purposes of the Statute have been complied with, good faith should be material. The good faith of appellant appears throughout the record. The findings of the trial judge are enlightening. Four of the findings are quoted:

X.

"That the defendant has not engaged in any actions or practices which constitute a violation

of Section 4(a) of the Emergency Price Control Act of 1942 other than in connection with the sale of the one machine tool described in these Findings." (R-30.)

XI.

"There is no evidence that the defendant violated the regulation in that he sold and offered to sell second hand machines and parts (31) without following the pricing practices as required by Section 1390.11 of the Regulation, except for the sale of the one machine tool hereinabove described." (R-30 & 31.)

XIII.

"That prior to the trial of this action the defendant, in consultation with and at the consent of agents of the plaintiff and of the Office of Price Administration, adopted and is using now in his business a form of invoice and written guarantee approved by the agents of the plaintiff and of the Office of Price Administration to obviate any further violations." (R-31.)

XIV.

"That there is no evidence that the defendant has violated the Regulations in any respect except in the one instance in the sale of the one machine tool, and there is no evidence that the defendant has threatened to or intends or will in the future violate the regulations of the plaintiff or of the Office of Price Administration." (R-31.)

The new form referred to in Finding XIII, quoted above contains the following language:

“All machine tools above described are equivalent to rebuilt and are guaranteed in accordance with OPA regulations unless otherwise specified ‘as is’.” (R-23.)

E. WHILE THERE WAS NO WRITTEN GUARANTEE THERE WAS WRITTEN AND ORAL EVIDENCE THAT THE TOOL WAS REBUILT AND GUARANTEED.

Appellant relies upon the facts, the evidence, elementary rules of law and the rules of the Court.

The judgment was rendered against appellant upon the stated ground that there was no written guarantee. What is the purpose of a written guarantee or of a writing of any kind?

The purpose is simply to furnish evidence of an intent or agreement. The writing is evidence in the event of a dispute. In this case there actually was a writing, defendant's Exhibit “A” (R-22) being a report made to the Price Administrator by appellant entitled “Secondhand Machine Tool Report”. Item 7 thereof reported the sale of the lathe as a rebuilt and guaranteed sale (R-21 & 22), as appellant reported in writing that the lathe was sold as a rebuilt and guaranteed machine, he was bound thereby. The purpose of the Regulations was accomplished. Had appellant repudiated his guarantee, the purchaser could have sued upon appellant's written statement in the report. No other evidence would be neces-

sary. In this instance, no one was harmed or could be harmed by the failure of the employee of appellant, despite explicit instructions to do so, to write the word "guaranteed" on the purchase order. That the employee was so instructed is clear from the evidence.

"Q. Did you instruct your employees, particularly Mr. Peabody (21) to make any notations on invoices as to whether or not the machine tool was 'as is' or guaranteed?

A. Yes, I did.

Q. What—

A. I have told them all to make sure."
(R. 20.)

That appellant orally guaranteed the lathe is undisputed.

"The Witness. In my transaction with the Montybex Company, when I brought that lathe up from Los Angeles, we made a guarantee to the Montybex Company that that lathe was guaranteed to be in first class working condition throughout, and if it was not satisfactory they could return it to us." (R-13) * * *

"Well, Mr. Montybex said it would be all right if I would guarantee the lathe he would place the order." (R-14.)

That the machine was bought by the purchaser as guaranteed is also undisputed.

"Q. Was this machine sold to you by the defendant in this action as a guaranteed or as an 'as is' machine?

A. Guaranteed." (R-24.)

The use of the word "invoice" in the testimony is misleading. The "invoice" referred to in the testimony was not an invoice but a purchase order signed by the purchaser. The document referred to as the "invoice" was the sole exhibit offered by appellee. It is plaintiff's exhibit No. 1. (R-16.) An inspection of this exhibit shows that it is not an invoice but an order for the lathe signed by the purchaser. Nowhere in the Regulations is it required that the purchaser should put the words "rebuilt and guaranteed" or "rebuilt or guaranteed" on a purchase order.

**F. OTHER FINDINGS ARE NOT SUPPORTED
BY THE EVIDENCE.**

Despite the fact that there was no evidence offered as to whether or not the lathe was a rebuilt machine or not a rebuilt machine or whether the lathe was invoiced as a rebuilt machine, the Court made the following findings:

V.

"That at the time of the sale and delivery of the said lathe the same was not rebuilt by the defendant within the meaning of that term as used in Section 3-(c) of said Maximum Price Regulation No. 1, and was not invoiced as such, and that no binding written guarantee (30) of satisfactory performance for a period of not less than thirty days from the date of shipment, or no written guarantee of any kind guaranteeing performance for any number of days from date

of shipment, was executed and delivered by the defendant to the purchaser of said lathe." (R-29.)

There is absolutely no evidence to support this finding and therefore the same was error.

The Court also found in Finding III (R-28 & 29) that the lathe and chuck "was a second hand machine tool". There is nothing in the evidence to support this finding except the exhibits themselves. Now then, if this finding must rely for support upon the exhibits, why could not a finding have been made that the machine was sold as a rebuilt and guaranteed machine in view of the fact, that the exhibits, especially defendant's Exhibit "A", Item 7 thereof, reports the sale of the said lathe as that of a "rebuilt and guaranteed" lathe. (R-22.)

G. PLAINTIFF HAD THE BURDEN OF PROOF.

It is elementary that the plaintiff has the burden of proof. It is incumbent upon him to prove his case. Appellee has failed in this regard. His primary failure was to prove his right to bring the action.

VI.

CONCLUSION.

It is elementary that the plaintiff has the burden of proof. Appellee in this case has failed in his proof. Primarily he has failed to show any right to

bring this action. He could only bring the action in the event that the buyer could not. He has failed to offer any proof to support his right to maintain the action.

It is respectfully submitted that appellant has shown the highest good faith throughout the conduct of his business as shown in the Record and that the omission on the part of an instructed employee to write the word "guaranteed" on a purchase order does not warrant a judgment on appellant. It is also respectfully submitted that the Act being penal in its nature, a strict compliance with the rules of pleading and evidence should be compulsory.

It is also respectfully submitted that the evidence does not support the findings and for that additional reason, the judgment should be reversed.

It is respectfully submitted that the judgment of the District Court awarding appellee the sum of \$974.25 should be reversed.

Dated, San Francisco, California,
March 27, 1946.

WALDO F. POSTEL,
Attorney for Appellant.

No. 11,239

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE FONTES, individually and doing business as Joe Fontes Machinery Company, Ltd.,

Appellant,

VS.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

GEORGE MONCHARSH,

Deputy Administrator for Enforcement,

MILTON KLEIN,

Director, Litigation Division,

DAVID LONDON,

Chief, Appellate Branch,

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PAUL P. O'BRIEN

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No. 11,239

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE FONTES, individually and doing business as Joe Fontes Machinery Company, Ltd.,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

ARGUMENT.

Appellant's argument may be summarized as follows: (1) an attack on the Administrator's right to bring this action; (2) that appellant's conduct was a sufficient compliance with the Act and the regulation; (3) that the Court's findings that the lathe was not rebuilt and that it was second hand are not supported by the evidence; and (4) that appellant's alleged good faith was material in the damage phase of the case.

We shall discuss these points in order.

I.

THE SALE OF THE LATHE WAS TO A PURCHASER FOR USE IN TRADE OR BUSINESS, AND, HENCE, THE ADMINISTRATOR HAD THE RIGHT OF ACTION. SINCE THIS WAS NOT A CONTESTED ISSUE, NO FINDING OF FACT WAS REQUIRED.

Specifications of Error 5 and 6 argued in Points B and C in appellant's brief are entirely lacking in merit. Appellant argues that the Administrator was not entitled to a judgment because there was a failure to produce any evidence, and the Court failed to make a finding that the lathe was purchased for use or consumption in the course of trade or business of the buyer.

In making this argument appellant ignores the fact that this was not a disputed issue in the case. In Paragraph 4 of count 2 of the complaint, plaintiff alleged:

"4. None of such purchases was made for use or consumption other than in the course of trade or business." (R. 3-4.)

Appellant's answer did not deny this allegation. There was, therefore, no necessity of the introduction of any evidence as to this matter. Rule 8(d) Federal Rules of Civil Procedure. Similarly, the lower Court was not required to make a specific finding of fact as to this phase of the case.¹

¹Actually, the lower Court recognized the fact that the sale was to a buyer for use or consumption in the course of trade or business. In Finding of Fact I, the Court found: "That the defendant, during the times mentioned in the complaint, was engaged in business * * * selling and offering to sell used machine tools to purchasers purchasing them in the course of trade or business." (R. 28.)

In *United States Trust Co. of N. Y. et al. v. Sears*, 29 Fed. Supp. 643 (D. Conn.), Circuit Judge Clark of the Second Circuit (acting as District Judge pursuant to statutory designation) said at page 645:

“Since, therefore, all statements of fact made on behalf of either the plaintiffs or the defendants stand admitted in the documents on file, no formal findings of fact by the court are required. Rule 52(a) F. R. C. P.”

Again, in *Matton Oil Transfer Corp. v. The Dynamic* (C.C.A. 2nd), 123 F. (2d) 999, the Court said at page 1001:

“We agree fully with the spirit and the terms of the resolution passed by a majority of the judges at our Judicial Conference of last June recommending ‘that the trial judge make brief, pertinent findings in respect to *contested* matters and file the same in connection with his opinion’. This puts the emphasis where it should be, namely, on brief and pertinent findings of *contested* matters * * *’ (Emphasis supplied.)

This Court recognized generally this principle in *Fanchon & Marco, Inc. v. Hagenbeck-Wallace Shows Co.*, 125 F. (2d) 101, 104, when it held that no finding was required upon an issue excluded by a pre-trial order.

It is somewhat surprising that appellant should raise this issue, in view of the fact that the *evidence presented by him* clearly shows that the sale was to a purchaser for use in the course of business. Upon questioning by appellant’s attorney, the buyer testified

that he operates a machine shop (R. 24) and that the machine was used by him after he obtained it. (R. 25.) It is well settled that a purchase of a commodity which the buyer intends to use or consume in his business is a purchase "for use or consumption * * * in the course of trade or business" within the meaning of Section 205(e) of the Act, so as to give the Administrator, only, the cause of action. The recent decision of this Court in *Bowles v. Trullinger*, 152 F. (2d) 191, is decisive of this point. There, this Court held that the purchase of a crawler-type tractor for use in the business of logging was a purchase for use in the course of trade or business. The Court reviewed a number of the authorities in support of this proposition and said at page 192:

"* * * the right to recover statutory damages for violation of the Maximum Price Regulations in the case of industrial buyer or buyers in the course of trade or business was vested only in the Administrator. Non-commercial consumers are the only ones empowered by the Act to bring suit for overcharges."

Appellant relies upon *Bowles v. Whayne*, 60 Fed. Supp. 78, without, perhaps, realizing that the decision of the District Court was reversed by the Circuit Court of Appeals for the 6th Circuit on December 17, 1945, 152 F. (2d) 375. The opinion of the Circuit Court of Appeals is in accord with that of this Court in the *Trullinger* case and relies upon the same authorities.

II.

**APPELLANT ADMITTEDLY DID NOT COMPLY WITH
THE REGULATION.**

Appellant's contentions that the purposes of the Act were fulfilled (Point A) and that the oral guarantee given to the purchaser was sufficient (Point E) are based upon a total disregard of both the Act and the regulation involved.

It is inconsistent to argue that the purposes of the Act have been fulfilled by conduct which is in clear violation of a regulation. The Emergency Price Control Act does not in itself fix maximum prices for commodities, but empowers the Administrator to issue regulations for that purpose. (Sec. 2.) Pursuant to that power, the Administrator issued Maximum Price Regulation No. 1, amended—Used Machine Tools, in which the Administrator established two general categories: machine tools sold as "rebuilt and guaranteed" and machine tools in "other condition". In each case, the maximum prices of the tools were fixed at a percentage of the price of the nearest equivalent new machine tool, depending upon the age of the machine tool. In the case of machine tools that were "rebuilt and guaranteed" within the definition of that phrase in the regulation, the percentages allowed as the maximum prices were considerably higher than those applicable to machine tools in "other condition".

In order to protect purchasers, the regulation provided certain requirements which a seller had to meet before he could sell a machine tool as "rebuilt and

guaranteed''. These requirements are set forth in Section 3(c) and are as follows:

“(c) *Meaning of the term ‘rebuilt and guaranteed’.* A rebuilt machine tool is one in which worn or missing part have been replaced or reworked, and which has been tested under power so as to prove that it has a substantially equivalent performance to that of the machine when new. The term ‘rebuilt and guaranteed’ applies only to a machine tool which (1) has been rebuilt or is in equivalent condition to a rebuilt machine tool and is invoiced as such; (2) has been inspected, and tested under power so as to prove that it has a substantially equivalent performance to that of the machine when new; (3) carries a binding written guaranty of satisfactory performance for a period of not less than thirty days from date of shipment; *and* (4) is expressly invoiced as a rebuilt machine tool or its equivalent and as having been guaranteed for satisfactory operation for thirty days.” (Italics in text.)

The regulation is clear and explicit. All requirements must be met by a seller, otherwise he cannot take advantage of the higher maximum price permitted for rebuilt and guaranteed machine tools. To permit a seller to substitute an oral guarantee for the written one, or to substitute his own conception of what would be “just as good” in lieu of any other specific requirement would lead to evasion of the regulation and destroy price control.

Appellant, admittedly, did not comply with the regulation. He did not give a “binding written guar-

antee". He did not invoice the machine tool "as a rebuilt machine tool or its equivalent and as having been guaranteed".² The appellant thus failed to meet two specific requirements.

III.

THE NECESSARY FINDINGS OF FACT ARE AMPLY SUPPORTED BY THE EVIDENCE.

In Point F, appellant contends that the portion of Finding of Fact V to the effect that the lathe was not rebuilt, and the statement in Finding of Fact III that the lathe was a second hand machine tool, are not supported by the evidence.

While the record is silent as to whether the lathe had been rebuilt, the Court's finding as to this issue, even though it is affirmatively unsupported by the evidence, does not prejudice the appellant. It may be considered as surplusage and disregarded. Under the regulation, even if the lathe had been a rebuilt machine, appellant was not entitled to sell it as a "rebuilt and guaranteed" machine tool unless he complied with the four requirements of the regulation, which we have previously discussed. That the lathe was a rebuilt machine would, if true, satisfy but one requirement. Appellant was still obliged to

²Appellant argues (brief, p. 15) that the regulation does not require the words "rebuilt and guaranteed" to be put on the purchase order. The record shows that appellants treated the purchase contract as the invoice. (R. 15.)

give the purchaser a binding written guarantee and was further obliged to invoice the lathe to the purchaser as a rebuilt machine and as having been guaranteed. Since appellant failed to comply with the regulation in these respects, he was not entitled to the "rebuilt and guaranteed" price. Even if the lathe was a rebuilt machine, and there is no proof that it was, it was not a rebuilt and guaranteed machine within the meaning of the regulation. If the machine were in fact rebuilt, it is reasonable to assume that defendant would have offered to prove it to show good faith and non-wilfulness in order to reduce the damages under Section 205(e).

The finding that the lathe was a second hand machine tool, is fully supported by the record. Appellant testified that he computed the price by placing the lathe in Class 4, which under the regulation is the class for machine tools built before January 1, 1920. (Table in Sec. 3(a) of MPR 1, as amended.) He testified that he did not know the exact age; that it could be "anything from 15 to 25 years". (R. 18-19.) Surely, it would be quite a stretch of the imagination in these days of extreme shortage of commodities to conclude that a machine of that age was anything but second hand. Moreover, if the machine were a new one, it is inconceivable that appellant would have sold it as second hand and determined its price on that basis. In view of the foregoing, it was hardly necessary that a witness testify in so many words that the lathe was a second hand machine. The finding of the Court was fully supported by the evidence.

IV.

GOOD FAITH IS NOT A DEFENSE TO THE ACTION.

In Point D, appellant argues that he showed the utmost good faith, and while he concedes that good faith is not an issue, contends that good faith should be material in this case.

First it should be noted that the findings cited by appellant do not support his contention of good faith. The effect of the findings quoted merely show that appellant did not violate the regulations, *except as to sale of the lathe*. Nor does Finding XIII aid the appellant. By it the Court found that *since the violation in question*, appellant has undertaken to comply with the regulation. Surely, that does not indicate that appellant acted in good faith *at the time that the violation occurred*.

Furthermore, good faith does not constitute a defense to an action for damages for a violation. Good faith, i.e., lack of wilfulness in violating, when coupled with the taking of practicable precautions against the occurrence of a violation will operate to reduce damages to the amount of the overcharge. (Section 205(e).) However, even where both of these elements are proved, there must be an assessment of at least single damages. They do not constitute a defense to the action.

In *Bowles v. Franceschini* (C.C.A. 1), 145 F. (2d) 510, the Court said at page 514:

“It seems clear from the unqualified language of the Act that good faith alone is not a sufficient

defense under § 108(b). Not only must the defendant show that the violations were not 'wilful' he must also show that he took 'practicable precautions' to avoid violating the regulations before he is entitled to the benefits of the reduction in damages."

To the same effect is *Bowles v. Hasting* (C.C.A. 5), 146 F. (2d) 94. See also *Bowles v. Indianapolis Glove Co.* (C.C.A. 7), 150 F. (2d) 597, 600.³

While we have discussed the effect of the proviso defense created by Section 205(e) as amended, it would be noted that the amount of the damages assessed is not a proper issue upon this appeal. The defense must be pleaded and proved by the defendant, *Bowles v. Glick Bros. Lumber Co.* (C.C.A. 9), 146 F. (2d) 566, 571-2. Appellant did not plead this defense in his answer. While the statute makes the assessment of damages between the amount of the overcharge and three times the overcharge discretionary with the trial Court, appellant does not complain of an abuse of the discretion by the lower Court.

³Even prior to the amendment of Section 205(e) by Section 108(b) of the Stabilization Extension Act of 1944, when the assessment of treble damages was mandatory, good faith was not a defense. *Bowles v. American Stores, Inc.* (App. D.C.), 139 Fed. (2d) 377, cert. den. 64 S. Ct. 947.

CONCLUSION.

We, therefore, respectfully submit that the judgment of the lower Court is correct and should be affirmed.

Dated, April 29, 1946.

Respectfully submitted,

GEORGE MONCHARSH,

Deputy Administrator for Enforcement,

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No. 11251

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CONSTANCE MAY GAVIN,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAY 4 1946

PAUL P. O'BRIEN,
CLERK

No. 11251

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

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Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the District Court of the United States

Southern District of California

Central Division

No. 4139-BH Civil

CONSTANCE MAY GAVIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF INDIVIDUAL
INCOME TAXES AND INTEREST THEREON

Plaintiff complains of the Defendant, and for cause of
action alleges:

I.

That at all times hereinafter mentioned, the defendant was and now is a sovereign body politic; that the plaintiff, Constance May Gavin, was and now is a citizen of the United States and a resident of the City of Los Angeles, State of California within the Sixth Collection District of the State of California.

II.

That during the year of 1938, at the time of collections from plaintiff and disbursements to the defendant of the taxes of \$22,373.66, plus interest in the amount of \$4,997.88, totaling \$27,371.54 as hereinafter mentioned, Nat Rogan was the Collector of Internal Revenue in and for the Sixth Collection District of California, and main-

tained his office as such Collector in the City of Los Angeles, State of California; that said Nat Rogan is not in [2] office at the time of commencement of this suit, and is now deceased.

III.

That the jurisdiction of this Court is invoked under the provisions of Paragraph 20 of Section 24 of the Judicial Codes of the United States.

IV.

That no action upon the claim herein referred to, other than as herein set forth, has been taken before the Congress or any of the departments of the United States, or in any Court; that no assignment or transfer of said claim has been made; that plaintiff is entitled to the amount herein claimed from the defendant and there is no just credit or offset against said claim which is known to the plaintiff.

V.

That one James L. Flood died testate in San Mateo County, State of California, on or about February 15, 1926. That the last Will and Testament of said deceased was admitted to Probate in the Superior Court of the State of California in and for the County of San Mateo. That thereafter and on or about March 15, 1927, Constance May Gavin, the plaintiff herein, filed a petition for partial distribution in the said Estate of said James L. Flood, wherein she claimed a share in said estate as the illegitimate child and pretermitted heir of said James L. Flood; that in the trial of the said matter, the Judge or-

dered a directed verdict therein in favor of said Estate and against the plaintiff herein, even though the jury stood in favor of plaintiff. That the plaintiff appealed to the Supreme Court of the State of California from the said order directing a verdict against her as aforesaid and the appeal resulted in a reversal of the decision of said trial court. That before a retrial of the issues could be had, the parties thereto on or about February 28, 1934, entered into a compromise agreement whereby said plaintiff, Constance May Gavin, received a settlement in cash and securities [3] equal to two-thirds of her asserted claim; that the value of the cash and securities received by the plaintiff during the year 1934 as a result of the settlement was of the approximate value of \$206,974.43, more or less.

VI.

That on May 10, 1938, the plaintiff filed with the said Collector of Internal Revenue for the Sixth District of California her return of individual income taxes for the year 1934, on Form 1040; that included in said return was the sum of \$82,789.77 representing forty percent of the \$206,974.43 received by the plaintiff from the said Flood Estate; that said sum was included as taxable income on the theory that is represented a gain from a sale or exchange of a capital asset held for more than five years, and less than ten years.

VII.

That the said return filed for the year 1934, disclosed a tax liability of the sum of \$22,373.66, which amount the plaintiff duly paid to the said Collector, together with

interest in the amount of \$4,997.88, making a total of \$27,371.54. as follows:

September 3, 1938	\$ 3,000.00	
October 3, 1938	1,000.00	
November 3, 1938	1,000.00	
December 2, 1938	22,371.54	
	<hr/>	
Total		\$27,371.54

VIII.

That on May 9, 1941, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California a claim for refund of said 1934 individual income taxes of \$22,373.66 and interest of \$4,997.88 paid by plaintiff to said Collector, plus interest thereon. Said claim for refund is founded on the provisions of Section 22 (b) (3) of the Internal Revenue Code, which provides that inheritances are excluded from taxable income, and that the inclusion as taxable [4] income for the year 1934, of the value, or any part thereof, of the cash and securities received by plaintiff from the Flood Estate, as a result of the compromise of her claim as an heir, was erroneous; a copy of said claim is attached hereto marked Exhibit "A" and hereby made a part hereof as though same were written at length herein.

IX.

That on or about August 12, 1941, the Collector of Internal Revenue, through his authorized agents, proposed to allow the claim for refund filed for the year 1934, in the amount of \$22,373.66 plus interest thereon. That

the plaintiff, through her attorney in fact, accepted said proposed allowance by executing Form 873 and forwarding same to the Internal Revenue Agent in Charge at Los Angeles, California.

X.

That subsequently, and on January 6, 1943, the Commissioner of Internal Revenue disallowed said claim for refund in full by sending a notice to that effect by registered mail to plaintiff. A copy of said notice is attached hereto marked Exhibit "B" and hereby made a part hereof as though same were written at length herein.

XI.

That said plaintiff has demanded of defendant the refund of said amount; that the defendant has not paid the same or refunded said sum, or any part thereof, or any portion of the interest to the said plaintiff, or any one else for plaintiff's benefit, use, or account.

XII.

That by reason of the facts hereinbefore alleged, plaintiff has overpaid her individual income taxes for the year 1934, as aforesaid, in the sum of \$27,371.54, and that the whole amount thereof, together with interest thereon, is now due and owing to [5] said plaintiff.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$27,371.54, together with interest thereon as provided by law and for such other and further relief as the Court may deem just and proper in the premises.

LESLIE L. HEAP

Attorney for Plaintiff [6]

[Verified.] [7]

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

Collector's Stamp
(Date received)
Received
May 9 1941
Coll. Int. Rev.
6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate
or income taxes).

[illegible]

[Type or Print]

Name of taxpayer or Purchaser of stamps Constance May Gavin (Mrs. John P. Gavin)

Business address

% Leslie L. Heap, Room 829, 453 South Spring Street
(Street) (City)

Los Angeles, California
(State)

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 6th California
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1934, to December 31, 1934
3. Character of assessment or tax Individual Income Tax
4. Amount of assessment, \$22,373.66; dates of payment 1938
5. Date stamps were purchased from the Government X
6. Amount to be refunded \$22,373.66 plus interest or such greater amount as is legally refundable
7. Amount to be abated (not applicable to income or estate taxes) \$.....
8. The time within which this claim may be legally filed expires, under Section 322 (b) (1) of the Revenue Act of 1934, on May 10, 1941

The deponent verily believes that this claim should be allowed for the following reasons:

See statement attached hereto and made a part hereof.

(Attach letter-size sheets if space is not sufficient)

Signed CONSTANCE MAY GAVIN

Sworn to and subscribed before me this 6th day of May 1941

(Seal)

AUDREY THOMPSON

(Signature of officer administering oath)

Notary Public

(Title)

(See Instructions on Reverse Side) [8]

* * * * *

STATEMENT ATTACHED TO AND MADE A
PART OF CLAIM FOR REFUND OF
CONSTANCE MAY GAVIN

Constance May Gavin hereinafter referred to as the "Taxpayer", because of an erroneous belief on May 10, 1938 filed Form 1040, Individual Income Tax Return for the calendar year 1934. Said return indicated net income of \$83,907.88. Said return claimed a personal exemption of \$2,500.00. Subsequent to the filing of said return Taxpayer paid to the Collector of Internal Revenue the tax shown on said return in the amount of \$22,373.66 plus six per cent (6%) interest on said sum from March 15, 1935 to the date payment was made. Said return treated as income subject to capital gain \$82,789.77 account of property received from the estate of James L. Flood, deceased. Omitting said property from taxable income eliminates all liability for tax. Said property was transferred to Taxpayer in compromise of a lawsuit wherein Taxpayer contested said decedent's will.

Said will omitted mention of Taxpayer and Taxpayer claiming to be a pretermitted heir contested said will.

In compromise of said will contest the executor acting for said decedent's estate transferred to taxpayer property in kind from the estate in substantially the amount that would have been received had taxpayer been successful in contesting said will.

Thereafter Taxpayer was told by representatives of the Bureau of Internal Revenue that the receipt of said property from said estate was taxable as income and Taxpayer

thereupon took steps to file a proper return and pay the tax shown thereon.

However, Taxpayer now learns that the United States Supreme Court in the case of *Lyeth v. Hoey*, 305 U. S. 188, 59 S. Ct. 155, 21 A. F. T. R. 986, determined that property received as a result of a contest by parties claiming to be entitled thereto because of the laws of inheritance take by inheritance and not by purchase. Therefore, the Supreme Court exempts from income tax property received as a compromise to a contest over the heirship of an estate.

Thereafter following the precedence established by the Supreme Court the United States Board of Tax Appeals and the Federal Courts have held as non-taxable property received as a result of a compromise of a lawsuit in which the claimant contends a right to the property as an heir. The Bureau of Internal Revenue has acquiesced in cases analogous to Taxpayer's.

Wherefore, Taxpayer respectfully requests the amount paid to be the Collector of Internal Revenue be refunded with interest forthwith, and that it be determined taxpayer has no liability for income tax on account of said property received from said estate. [9]

EXHIBIT "B"

TREASURY DEPARTMENT

Washington

Jan 6, 1943

(Cut)

Office of

Commissioner of Internal Revenue

Address reply to Commissioner of

Internal Revenue and refer to

IT:C1:CC:Rej

Mrs. Constance May Gavin,

c/o Leslie L. Heap,

Room 829, 453 South Spring Street,

Los Angeles, California

In re: Claim for refund of \$22,373.66.

For the year 1934

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

Respectfully,

GUY T. HELVERING,

Commissioner

By

Deputy Commissioner.

994M (Rev.)

[Endorsed]: Filed Jan. 2, 1945. [10]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiff's complaint admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Denies that the plaintiff is entitled to the amount claimed in this action, or any other amount; that as to the other matters alleged in paragraph IV of plaintiff's complaint defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

V.

Denies each and every allegation contained in paragraph V thereof except that defendant admits that one James L. Flood died testate in San [11] Mateo County, State of California, on or about February 15, 1926. That the last Will and Testament of said deceased was admitted to Probate in the Superior Court of the State of California, in and for the County of San Mateo. That

thereafter and on or about March 15, 1927, Constance May Gavin, the plaintiff herein, filed a petition for partial distribution in the said Estate of said James L. Flood, wherein she claimed a share in said estate as the illegitimate child and pretermitted heir of said James L. Flood; that in the trial of said matter, the Judge directed a verdict against the plaintiff herein. That the plaintiff appealed to the Supreme Court of the State of California from the said order directing a verdict against her as aforesaid and the appeal resulted in a reversal of the decision of said trial court. That before a retrial of the issue could be had, a compromise agreement was entered into whereby said plaintiff, Constance May Gavin, received a settlement in cash and securities of the approximate value of \$206,974.43, more or less.

VI.

That as to the allegations contained in paragraph VI thereof, defendant is without knowledge or information sufficient to form a belief as to the truth thereof, except that defendant admits that on May 10, 1938, the plaintiff filed with the said Collector of Internal Revenue for the Sixth District of California her return of individual income taxes for the year 1934, on Form 1040; that included in said return was the sum of \$82,789.77 representing part of the \$206,974.43 received by the plaintiff under the settlement above referred to.

VII.

Admits the allegations contained in paragraph VII thereof.

VIII.

Denies each and every allegation contained in paragraph VIII thereof except that defendant admits that on or about May 9, 1941, plaintiff filed the claim for refund of which Exhibit "A" is a true and correct copy and plaintiff thereby filed with the Collector of Internal Revenue for the Sixth District of California, a claim for refund of said 1934 individual income taxes of \$22,373.66 and interest of \$4,997.88 paid by plaintiff to said Collector plus [12] interest thereon.

IX.

Denies each and every allegation contained in paragraph IX thereof.

X.

Admits the allegations contained in Paragraph X.

XI.

Admits the allegations contained in paragraph XI.

XII.

Denies each and every allegation contained in paragraph XII thereof.

Wherefore having fully answered plaintiff's complaint defendant prays it be dismissed hence with its costs in this behalf expended.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant United States Attorneys

By George M. Bryant

Assistant United States Attorney

Attorneys for Defendant

[Minutes: Tuesday, May 8, 1945]

Present: The Honorable Ben Harrison, District Judge.

On the Court's own motion, and, it appearing that Answer of the defendant has been filed herein, it is ordered that the clerk place this case on the calendar of May 14, 1945, at 10 A. M., for setting for trial and that the clerk notify counsel to appear at that time. [14]

[Minutes: Monday, May 14, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for setting for trial; Leslie L. Heap, Esq., appearing as counsel for the plaintiff; Geo. M. Bryant, Assistant U. S. Attorney, appearing as counsel for the Government; and H. A. Dewing, Court Reporter, being present and reporting the proceedings:

It is ordered that the cause be, and it hereby is, set for trial June 18, 1945, at 11 A. M. [15]

[Minutes: Thursday, June 14, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming before the Court; Leslie L. Heap, Esq., appearing for the plaintiff, and Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, appearing for the defendant; by consent of said counsel appearing, it is hereby ordered that the order heretofore entered setting this cause for trial for June 18, 1945, at 11 A. M., is vacated and set aside, and this cause is now ordered continued to July 2, 1945, at 10 A. M. for setting for trial. [16]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT ON
PLEADINGS

To Defendant, United States of America, and to Charles H. Carr, United States Attorney, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, its Attorneys:

You and each of you will please take notice that on July 2, 1945, at 10 o'clock A. M., or as soon thereafter as counsel may be heard, in courtroom number Six of the above entitled Court, Plaintiff, by and through her counsel, will move the said court for a Judgment for Plaintiff on the pleadings in the above entitled action.

Said motion will be made upon the ground that the answer of said Defendant on file herein does not state facts sufficient to constitute a defense to the cause of action set forth in Plaintiff's complaint herein.

Said motion will be made and based upon this notice of motion, [17] the written motion served and filed herewith, the pleadings herein and the Plaintiff's statement of reasons and points and authorities in support of said motion which are served and filed herewith.

Dated: June 21, 1945.

LESLIE L. HEAP

Attorney for Plaintiff

[Endorsed]: Filed Jun. 21, 1945. [18]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON PLEADINGS

Now comes the Plaintiff in the above entitled action, by and through Leslie L. Heap, her counsel, and moves the above entitled court that Judgment be given and entered in this action for the Plaintiff on the pleadings in this cause.

In support of this motion Plaintiff alleges that it is made upon the ground that the answer of the Defendant herein does not state facts sufficient to constitute a defense to the cause of action set forth in Plaintiff's complaint herein.

This motion is made and based upon the pleadings in said cause, this motion, the notice of motion served and filed herewith, the statement of reasons and points and authorities served and filed herewith.

Dated: June 21st, 1945.

LESLIE L. HEAP

Attorney for Plaintiff

[Endorsed]: Filed Jun. 21, 1945. [19]

[Title of District Court and Cause.]

PLAINTIFF'S REASONS AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON PLEADINGS

I.

In addition to Jurisdictional facts the complaint alleges in substance, and the answer admits:

1. That Plaintiff claimed to be the daughter and pretermitted heir of the decedent referred to in the complaint;

2. That she filed a petition for partial distribution in the Estate of said decedent claiming a share of said Estate as the child and pretermitted heir of said decedent.

3. That after a directed verdict in the first trial was reversed by the Supreme Court and before a retrial, said claim was compromised and settled.

4. That in said compromise and settlement, Plaintiff received in cash and securities of the approximate value of \$206,974.43.

5. That a return on form 1040 was filed and \$82,789.77 (40% of \$206,974.43) was taxed as income and the tax amounting to [20] \$22,373.66 and interest of \$4,997.88 or a total of \$27,371.54 was paid as alleged in paragraph VII of the complaint.

6. That a claim for the refund of said taxes was filed May 9, 1941.

7. That on January 6th, 1943, the Commissioner of Internal Revenue disallowed and denied said claim.

8. That Plaintiff has demanded the refund of said taxes together with interest thereon and the Defendant has refused to refund any part thereof.

As shown by the foregoing, Defendant's answer presents no material issue of fact, but only an issue of law to be determined by the Court. The Plaintiff has accordingly moved for a judgment on the pleadings.

It is Plaintiff's contention that such motion is proper and should be granted because the amounts received by Plaintiff in said settlement was not income within the meaning of the 16th Amendment to the United States Constitution, nor income in any sense; and furthermore, if it were, it should be excluded because it was an inheritance or at least in the nature of an inheritance. [21]

II.

* * * * *

* * * Inasmuch as the facts hereinabove stated show on the face of the Pleadings herein, Plaintiff is entitled to judgment on her Motion for Judgment on the Pleadings.

Respectfully submitted,

LESLIE L. HEAP

Attorney for Plaintiff

[Endorsed]: Filed Jun. 21, 1945. [25]

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION OF
MOTION FOR JUDGMENT ON THE PLEAD-
INGS [26]

* * * * *

The defendant has admitted the allegations of Paragraphs I, II, III, VII, X and XI of the Complaint. Paragraph IV of the Answer denies that plaintiff is entitled to the amount claimed in the action, or any other amount. Paragraph V of the Answer admits the allegations contained in the complaint that James L. Flood died testate in San Mateo County, State of California, on or about February 15, 1926; that the last will and testament of said deceased was admitted to probate in the Superior Court of the State of California in and for the County of San Mateo. That thereafter, and on or about March 15, 1927, Constance May Gavin, the plaintiff herein, filed a petition for partial distribution in the said estate of the said James L. Flood, wherein she claimed to share in said estate as the illegitimate child and pretermitted

heir of said James L. Flood; that in the trial of said matter the Judge directed a verdict against the plaintiff herein as aforesaid, and the appeal resulted in a reversal of the decision of said trial court. That before a retrial of the issue could be had, a compromise agreement was entered into whereby said plaintiff, Constance May Gavin, received a settlement in cash and securities of the approximate value of \$206,974.43 more or less; all other allegations of paragraph V of the Complaint are denied in the Answer. The Answer admits the filing of plaintiff's income tax return for the year 1934, and a claim for the refund of tax reported and paid for that year. The Answer admits that the Commissioner of Internal Revenue rejected the plaintiff's claim for refund of the plaintiff's 1934 income taxes. The Answer denies that plaintiff received any sum as an heir of James L. Flood, deceased. [27]

* * * * *

CONCLUSION

It is submitted that the plaintiff's Motion for Judgment on the Pleadings should be denied.

CHARLES H. CARR EH

United States Attorney

E. H. MITCHELL EH

Asst. United States Attorney

GEORGE M. BRYANT EH

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Defendant, United States
of America

[Endorsed]: Filed Jun. 27, 1945. [37]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO DEFENDANT'S MEMO-
RANDUM OF POINTS AND AUTHORITIES
OPPOSING MOTION FOR JUDGMENT ON
PLEADINGS

I.

Statement Re Facts Shown By Pleadings:

We again repeat that the complaint alleges and the answer admits the facts enumerated 1 to 8 inclusive on page 1 and 2 of Plaintiff's Reasons and Points and Authorities in support of her motion for Judgment on the pleadings.

Counsel for the defense very adroitly avoids referring to those alleged and admitted facts, but it is to be noticed that none of those facts are denied in Defendant's Points and Authorities. Furthermore, we believe that some of the statements of counsel for the defense in their points and authorities in opposition to the motion are misleading and confusing. For instance, in four different places in Defendant's said points and authorities, (L. 24 & 25, p. 2; L. 10 & 11, p. 5; L. 30-32, p. 5; L. 14 & 15, p. 11), it is said that the answer denies that Plaintiff received the money and property taxed herein from the Flood Estate. The fact is that the answer in [38] referring to Plaintiff's suit against the Estate (L. 14 to 18, p. 2 of Answer) states:

"That before a retrial of the issue could be had, a compromise agreement was entered into whereby said plaintiff, Constance May Gavin, received a settlement in cash and securities of the approximate value of \$206,974.43 more or less."

That is the fact we set forth as number 3 in our above mentioned statement of alleged and admitted facts. The fact is that Plaintiff's suit against said estate was compromised and settled and the tax involved herein was assessed against the money and property she received in said settlement. It is our contention that it was not income and that the tax was therefore erroneous.

In our opinion the Defendant is begging the question. It is quite evident from the Defense Points and Authorities opposing the motion that the Defendant fully realizes that the sole issue involved herein is one of law, not fact, to-wit: whether under the said 8 enumerated alleged and admitted facts, Plaintiff is entitled to Judgment? We contend that under those facts shown by the pleadings this motion should be granted. [39]

* * * * *

Therefore, Plaintiff submits that under the facts alleged and admitted by pleadings, as enumerated in our opening points and authorities in support of this motion, a clear issue of law is presented and under the cases heretofore cited, the Plaintiff's motion for Judgment on the pleadings should be granted.

Respectfully submitted,

LESLIE L. HEAP

Attorney for Plaintiff

[Endorsed]: Filed Jun. 29, 1945. [50]

[Minutes: Monday, July 2, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for hearing on motion of plaintiff for judgment on the pleadings, pursuant to notice, motion and points and authorities in support thereof, filed June 21, 1945; and for setting for trial; Leslie L. Heap, Esq., appearing for the plaintiff; Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, appearing for the Government: Counsel for plaintiff makes a statement to the Court. Attorney Harpole makes a statement. The Court makes a statement and orders said motion and setting continued to July 5, 1945, at 10 A. M. and that this cause is set for pre-trial hearing at the same time. [51]

[Minutes: Thursday, July 5, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for (1) pre-trial hearing; (2) motion of plaintiff for judgment on the pleadings, pursuant to notice, motion, and points and authorities, in support thereof, filed June 21, 1945; and (3) setting for trial; Leslie L. Heap, Esq., appearing as counsel for the plaintiff; Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing as counsel for the Government; the Court and counsel for the parties hereto have a discussion as to the issues herein, and as to the contentions of the parties hereto. The Court makes a statement and suggests a stipulation of facts by the parties, and orders that this cause be set down for trial on July 31, 1945, at 10 A. M. No ruling is made by the Court on the said motion of the plaintiff for judgment on the pleadings at this time. [52]

[Minutes: Tuesday, July 31, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for hearing on (1) motion of plaintiff for judgment on the pleadings, and for trial; Leslie L. Heap, Esq., appearing for the plaintiff; Geo. M. Bryant, Assistant U. S. Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing for the defendant; both sides answer ready.

Attorney Heap makes a state re written stipulation of facts and the nature of the evidence to be presented, and the Court reads the stipulation of facts and orders same filed herein. On Motion of Attorney Heap, Plaintiff's exhibits to the stipulation of facts, to-wit: Plaintiff's Exhibits A, B, C, D and E are offered and admitted.

Both sides rest.

Respective counsel present and the Court have a discussion. The Court makes a statement and orders said motion of plaintiff for judgment on the pleadings denied. and orders this case stand submitted for decision upon the pleadings and the evidence presented by the stipulation of facts and the said exhibits. [53]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendant, that the following facts are true and, subject to the right of either party to object on the ground of their relevancy or materiality, may be offered in evidence at the trial of the above entitled action, and that either party may introduce evidence of other material or relevant facts.

I.

James L. Flood died testate in San Mateo County, State of California, on or about February 15, 1926. His last Will and Testament was admitted to Probate by the Superior Court of the State of California in and for said County on March 11, 1926 and James E. Walsh and Maud Lee Flood, named in said Will as Executors were appointed Executors thereof on or about said last mentioned date and Letters Testamentary were issued accordingly. That said two last named persons were then and continued to be the duly qualified, appointed and acting Executors in said matter until the death of said [54] James E. Walsh on April 15, 1932. Thereafter and during all times hereinafter mentioned said Maud Lee Flood was and continued to be the duly qualified, appointed and acting sole Executor in said matter.

II.

That said Maud Lee Flood was the widow of said decedent and James Flood and Mary Emma Flood both hereinafter mentioned were his son and daughter respectively. That Cora Jane Flood was a sister of said decedent James L. Flood. She died November 1, 1928 during the administration of said estate.

III.

On August 12, 1931, said James E. Walsh and Maud Lee Flood as trustees, sold 4,295 shares of the Flood Realty Company stock to the Flood Realty Company, and at the time of distribution of the estate said Maud Lee Flood consented to the distribution of said 4,295 shares to said company.

IV.

On March 13, 1927, Constance May Gavin filed in the Court probating the said estate, a petition for partial

distribution, claiming that she was entitled to 2/9ths of said estate as the daughter and pretermitted heir of said decedent and asking for distribution of a portion of said estate to her. A trial of the matters set forth in said petition was had before a jury and the trial court directed a verdict against the petitioner in August, 1931 and a judgment thereon was entered against her. An appeal was taken from said judgment and on the 18th day of April, 1933, the Supreme Court of the State of California (in Bank) by written opinion, reversed the decision against the petitioner and remanded the cause for a new trial. That said decision is reported in 217 Cal. 763 and a copy of said decision marked Exhibit "A" is to be admitted in evidence. A remittitur was filed May 20, 1933.

V.

Between May 20th, 1933 and February 28th, 1934, a compromise [55] settlement was arranged under which the following things were to and did occur:

1. Said litigation was to be settled and terminated and it was settled and terminated on February 28, 1934, in the manner hereinafter set forth.

2. Plaintiff was to receive 2/3 of the amount sought in her petition for final distribution or 4/27 of the Estate of James L. Flood that became available for distribution and plaintiff or her assigns have in fact received that portion of said estate.

3. Plaintiff was to sign a certain document designated as an Agreement dated February 28, 1934 and deliver it to the representatives of said estate. She did sign said document and deliver the same to the representatives of the Estate of said James L. Flood, deceased, on the 28th

day of February, 1934. A copy of said document marked Exhibit "B" is to be admitted in evidence.

4. Petitioner was to permit and on the said 28th day of February, 1934, did permit her petition for partial distribution to come on for hearing without a contest, whereupon Findings of Fact, Conclusions of Law and a Judgment disposing of said petition were made and entered on the 28th day of February, 1934, and have become final. A copy of the Minutes of said proceedings and copies of said Findings of Fact, Conclusions of Law and Judgment, marked "Exhibit C" are to be admitted in evidence. She consented to the use of the document referred to in item 3 above for the purpose of supporting said Findings of Fact, Conclusions of Law and Judgment.

5. A Decree for the Final Distribution of the Estate of said James L. Flood, was to be and in fact was made and entered by the Probate Court on February 28, 1934. A copy of said Decree of Final Distribution, marked "Exhibit D" is to be admitted in evidence. Said Decree of Final Distribution has become final [56] and the distributions therein provided have been made to plaintiff and her assignees, Eugene Aureguy, John J. Taaffe, Tressie G. Taaffe, Maxwell McNutt, Albert Mansfield and Carmelita Aureguy.

VI.

The plaintiff in an effort to comply with the demands of the Revenue Department, filed an Income Tax Return on or about May 10, 1938, which said return covered the year of 1934. A copy of said return, with its attached statements, is to be marked "Exhibit E" and admitted in evidence.

VII.

The petitioner paid to the Collector of Internal Revenue the alleged income taxes and interest in the amounts and on the dates set forth in Paragraph VII of the complaint herein.

VIII.

On May 9, 1941, Plaintiff filed a claim for refund as set forth in her complaint and Exhibit "A" attached to the complaint herein is a true copy of said claim for refund.

IX.

That thereafter and on January 6, 1943, as set forth in the complaint herein, the Commissioner of Internal Revenue disallowed said claim for refund in full by sending a notice to that effect by registered mail to plaintiff. Exhibit "B" attached to the complaint is a true copy of that notice. Thereafter this suit followed.

LESLIE L. HEAP

Attorney for Plaintiff

CHARLES H. CARR—E.H.

U. S. Attorney

E. H. MITCHELL—E.H.

GEORGE M. BRYANT—E.H.

Assistant U. S. Attorneys

EUGENE HARPOLE

Special Attorney

Attorneys for Defendant

[Minutes: Thursday, August 2, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause having been heretofore tried by the Court and ordered submitted, and the Court having duly considered the pleadings, evidence, and the law applicable, and being fully advised in the premises, now hands down and orders filed its Memorandum Opinion, and in accordance therewith, orders judgment in favor of the plaintiff. The plaintiff is directed to prepare and present for signature proposed Findings of Fact and Conclusions of Law and Judgment. Filed Memorandum Opinion. [58]

[Title of District Court and Cause.]

MEMORANDUM OPINION

This case is the outgrowth of the decision of the Supreme Court of the State of California in the Estate of Flood, 21 P. (2d) 579. Before the retrial of the above case the parties entered into a compromise and as a result the plaintiff herein received approximately two-thirds of what she would have received had she prevailed on a retrial.

The government contends that inasmuch as her heirship was not established and entered into an agreement as part of her compromise, that she was not in fact an heir and, therefore, the amount received as a result of such compromise should be treated as income and should be taxable as such.

I am of the opinion that the plaintiff is entitled to recover under the authorities of *Lyeth v. Hoey* etc., 305 U. S. 188; *Magruder v. Segebade*, 94 F. (2d) 177, and *Keller v. Commissioner* etc., 41 B. T. A. 478.

As stated in *Lyeth v. Hoey*, 305 U. S. 188, on page 194:

“In exempting from the income tax the value of property acquired by ‘Bequest, devise, or inheritance,’ Congress used comprehensive terms embracing all acquisitions in the devolution of a decedent’s estate.”

And again on page 196 used the following language:

“* * * We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption. It does so, because it disregards the heirship which underlay the compromise, the status [59] which commanded that agreement and was recognized by it.”

See *Helvering v. Safe Deposit Company*, 316 U. S. 56.

If we disregard form for substance, it would appear to me that the money the plaintiff received under the decree of distribution in the Flood Estate was an acquisition in the devolution of said estate.

I look upon the wording of the agreement and consent decree that she was not an heir, a mere formality prepared and mapped out by legal talent in order to carry out the settlement of the then pending litigation. To me the real question of law to be determined is whether money or property received by one in settlement of his or her

claim to participate in the distribution of an estate is to be treated as income.

The law favors compromises (15 C. J. S. p. 738, Sec. 23, 26 C. J. S. p. 1111) and I see no reason why a rule of law should be established that would preclude compromises such as we find in this case. Under present rates of taxation such compromises would virtually cease.

We must remember that the government has lost nothing by reason of this compromise. If plaintiff had pursued her claim to a successful conclusion no tax would be due. On the other hand, if she had failed, no tax would follow.

I see no reason why this court should go back of the compromise and try the issue of heirship in order to satisfy the government that the claim of heirship was bona fide. Every compromise results in a loss to someone. If, in this court she should be able to establish her heirship, then the other heirs received more than their distributive share and such excess, under the government's theory, would be taxable as income. Are the District Courts to be called upon to determine who won or lost by reason of compromise between private parties?

I feel that the compromise agreement and the subsequent distribution pursuant thereto should be binding upon this court and not subject to review. [60]

Plaintiff is directed to submit proposed findings and judgment in accordance with this memorandum opinion.

Dated: This 2 day of August, 1945.

BEN HARRISON

Judge

[Endorsed]: Filed Aug. 2, 1945. [61]

[Minutes: Monday, August 20, 1945]

Present: The Honorable Ben Harrison, District Judge.

Findings of Fact and Conclusions of Law are now signed and it is ordered that they be filed. Judgment is signed and it is ordered that the said judgment be filed and entered. See C. O. B. [62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial on July 31, 1945, and having been tried before the above entitled court, the Honorable Ben Harrison presiding, without a jury (a jury having been waived by the parties), Leslie L. Heap, Esq., appearing for the plaintiff, and Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, and George M. Bryant, Esq., Assistant United States Attorney, appearing for the defendant; evidence having been introduced and said cause having been argued and submitted for decision and the court being fully advised in the premises, makes the following findings of fact:

FINDINGS OF FACT

I.

That at all times hereinafter mentioned, the defendant was and now is a sovereign body politic; that the plaintiff, Constance May Gavin, was and now is a citizen of the United States and a resident of the City of Los Angeles, State of California within [63] the Sixth Collection District of the State of California, and subject to the jurisdiction of this Court.

II.

That during the year of 1938, at the time of collections from plaintiff and disbursements to the defendant of the taxes of \$22,373.66, plus interest in the amount of \$4,997.88, totaling \$27,371.54 as hereinafter mentioned, Nat Rogan was the Collector of Internal Revenue in and for the Sixth Collection District of California, and maintained his office as such Collector in the City of Los Angeles, State of California; that said Nat Rogan was deceased and was not in office at the time of the commencement of this suit.

III.

That the jurisdiction of this Court is invoked under the provisions of Paragraph 20 of Section 24 of the Judicial Codes of the United States.

IV.

That one James L. Flood died testate in San Mateo County, State of California, on or about February 15, 1926 and his last Will and Testament was admitted to Probate by the Superior Court of the State of California in and for said County on March 11, 1926 and James E. Walsh and Maud Lee Flood, named in said Will as Executors, were appointed Executors thereof on or about said last mentioned date and letters Testamentary were issued accordingly. That said named Executors were then and continued to be the duly qualified, appointed and acting Executors in said matter until the death of said James E. Walsh on April 15, 1932, and thereafter and during all times hereinafter mentioned, said Maud Lee Flood was and continued to be the duly qualified, appointed and acting sole Executor in said matter.

V.

That on March 13, 1927, Constance May Gavin, the plaintiff herein, filed in the Court probating the said

Flood Estate [64] a petition for partial distribution, claiming that she was entitled to two-ninths of said estate as the daughter and pretermitted heir of said decedent and asking for distribution of a portion of said estate to her. That a trial of the matters set forth in the petition for partial distribution was had before a jury and the trial court directed a verdict against the petitioner and in favor of the estate in August 1931. That an appeal was taken from the order directing a verdict against her as aforesaid and on the 18th day of April, 1933 the Supreme Court of the State of California (in Bank) reversed the decision against the petitioner and remanded the cause for a new trial and a remittitur was filed May 20, 1933.

VI.

That between May 20, 1933 and February 28, 1934, a compromise settlement was arranged between Constance May Gavin and the representatives of said estate whereby the following things were to be, and the same were done.

1. The litigation between the parties was to be settled and terminated and was settled and terminated on February 28, 1934, in the manner hereinafter set forth.

2. Constance May Gavin was to receive two-thirds of the two-ninths of said estate sought by her in her said petition for partial distribution or four-twenty sevenths of said estate that became available for distribution and she and her assigns received that portion of said estate.

3. Constance May Gavin was to sign and deliver to the representatives of the Estate of James L. Flood, the original of that certain document in evidence marked Exhibit "B"; and she did sign and deliver that document to the representatives of said estate.

4. Constance May Gavin was to permit and on the said 28th day of February 1934, did permit her petition for partial distribution to come on for hearing without a contest and the originals of the Minutes, Findings of Fact, Conclusions of Law and Judgment [65] disposing of said petition in evidence marked Exhibit "C" were made and entered on that date and said judgment has become final. Said petitioner was to and did consent to the use of said document referred to as Exhibit "B" in Item 3 above for the purpose of supporting said Findings of Fact, Conclusions of Law and Judgment.

5. The Decree of Final Distribution of the Estate of James L. Flood in evidence marked Exhibit "D" was to be, and was, made and entered by the Probate Court on February 28, 1934 and said Decree provided for the distribution of four-twenty sevenths of the said estate to Constance May Gavin and her assigns and the said distributions therein provided for were made to said petitioner and her assignees.

VII.

That Plaintiff in an effort to comply with the demands of the Revenue Department, filed the original of that certain Income Tax Return for the year 1934, a copy of which is in evidence marked Exhibit "E". That said return included as income the value of the property received by her in said settlement and the tax liability thereon of \$22,373.66 was based on the inclusion of said property as income.

VIII.

That the said Income Tax of \$22,373.66 shown by said return was duly paid by Plaintiff to the Collector of Internal Revenue for the Sixth District of California, together with interest thereon in the amount of \$4,997.88,

making a total of \$27,371.54 in the amounts and on the dates as follows:

September 3, 1938	\$ 3,000.00
October 3, 1938	1,000.00
November 3, 1938	1,000.00
December 2, 1938	22,371.54
<hr/>	
Total	\$27,371.54

IX.

On May 9, 1941, plaintiff filed with the said Collector of Internal Revenue for the Sixth District of California a claim for [66] refund of the said 1934 individual income taxes of \$22,373.66 and interest thereon of \$4,997.88 paid by plaintiff to said Collector, plus interest thereon.

X.

On January 6, 1943, the Commissioner of Internal Revenue disallowed said claim for refund in full by sending a notice to that effect by registered mail to the plaintiff.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes, as follows:

I.

That none of the value of the property received by the plaintiff in the said compromise settlement of her said litigation for a share of said estate constituted taxable income to her.

II.

That the said tax of \$22,373.66 and interest thereon in the sum of \$4,997.88 paid by plaintiff to the defendant

through its agents and employees during 1938, was illegally, erroneously and wrongfully assessed and collected.

III.

That plaintiff has overpaid her individual income taxes for the year of 1934 in the sum of \$27,371.54 and that the whole amount thereof, together with interest thereon is now due and owing to said plaintiff from the defendant herein.

IV.

The plaintiff herein is entitled to recover from the defendant the sum of \$38,463.30 with interest as provided by law.

V.

The plaintiff have and recover her costs herein.

VI.

Judgment should be entered herein for the plaintiff and [67] against the defendant for the said sum of \$38,463.30, with interest as provided by law.

Dated this 20th day of August, 1945.

BEN HARRISON

United States District Judge

Approved as to form:

CHARLES H. CARR—E.H.

E. H. MITCHELL—E.H.

GEORGE M. BRYANT—E.H.

EUGENE HARPOLE

Attorneys for Defendant.

[Endorsed]: Filed Aug. 20, 1945. [68]

In the District Court of the United States

Southern District of California

Central Division

No. 4139-BH Civil

CONSTANCE MAY GAVIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT FOR PLAINTIFF

The above entitled cause having come on regularly for trial on July 31, 1945, in the above entitled court, before the Honorable Ben Harrison, Judge thereof presiding, without a jury, Leslie L. Heap, Esq., appearing for plaintiff and Eugene Harpole, Esq., Special Attorney for Bureau of Internal Revenue, and George M. Bryant, Esq., Assistant United States Attorney, appearing for Defendant; and evidence having been introduced and said cause having been argued and submitted for decision; and findings of fact and conclusions of law having been made and filed;

It Is Therefore Hereby Adjudged and Decreed that plaintiff have and recover from the defendant the sum of \$27,371.54, together with interest thereon in the sum of \$11,091.76, said sums in the aggregate amounting to \$38,463.30.

It Is Further Adjudged and Decreed that plaintiff [70] have and recover from defendant costs incurred herein in sum of \$.

Dated: August 20, 1945.

BEN HARRISON

United States District Judge

Approved as to form:

CHARLES H. CARR E.H.

E. H. MITCHELL E.H.

GEORGE M. BRYANT

EUGENE HARPOLE

Attorneys for Defendant

Judgment entered Aug. 20, 1945. Docketed Aug. 20, 1945. Book C. O. #34, Page 376. Edmund L. Smith, Clerk, by Murray E. Wire, Deputy.

[Endorsed]: Filed Aug. 20, 1945. [71]

[Title of District Court and Cause.]

STIPULATION FOR AMENDMENT OF THE
JUDGMENT

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendant, subject to the approval of the Court, that the recovery paragraph of the Judgment entered in the above-entitled action on August 20, 1945, may be amended to read as follows:

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff have and recover of and from the defendant the sum of \$27,371.54, together with interest on \$3,000 from September 3, 1938, on \$1,000 from October 3, 1938, on \$1,000 from November 3, 1938, and on \$22,371.54 from December 2, 1938, as provided by law.

Dated: this 27 day of September, 1945.

LESLIE L. HEAP

Attorney for Plaintiff [72]

CHARLES H. CARR EH

United States Attorney

E. H. MITCHELL EH

Asst. United States Attorney

GEORGE M. BRYANT EH

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Defendant, United States
of America.

It Is So Ordered this 1st day of Oct., 1945.

BEN HARRISON

United States District Judge

[Endorsed]: Filed Oct. 4, 1945. [73]

In the District Court of the United States
Southern District of California

Central Division

No. 4139-BH

CONSTANCE MAY GAVIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED JUDGMENT FOR PLAINTIFF

The above entitled cause having come on regularly for trial on July 31, 1945, in the above entitled court, before the Honorable Ben Harrison, Judge thereof presiding, without a jury, Leslie L. Heap, Esq., appearing for plaintiff and Eugene Harpole, Esq., Special Attorney for Bureau of Internal Revenue, and George M. Bryant, Esq., Assistant United States Attorney, appearing for Defendant; and evidence having been introduced and said cause having been argued and submitted for decision; and findings of fact and conclusions of law having been made and filed;

It is therefore ordered, adjudged and decreed that the plaintiff have and recover of and from the defendant the sum of \$27,371.54, together with interest on \$3,000 from September 3, 1938, on \$1,000 from October 3, 1938, on \$1,000 from November 3, 1938, and on \$22,371.54 from December 2, 1938, as provided by law.

It is further adjudged and decreed that plaintiff have and recover from defendant costs incurred herein in the sum of \$. [74]

Dated: Oct. 1, 1945.

BEN HARRISON

United States District Judge

Approved as to Form:

Attorneys for Defendant.

Amended Judgment entered Oct. 4, 1945. Docketed Oct. 4, 1945. Book C. O. 35, Page 199. Edmund L. Smith, Clerk, by Murray E. Wire, Deputy.

[Endorsed]: Filed Oct. 4, 1945. [75]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on August 20, 1945, and subsequently amended by stipulation on the 4th day of October, 1945.

Dated: this 19th day of November, 1945.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Asst. U. S. Attorney

GEORGE M. BRYANT

Asst. U. S. Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

By Eugene Harpole

[Endorsed]: Filed & mld. copy to Lesley L. Heap, atty. for plf. Nov. 19, 1945. [76]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE
ON APPEAL

Good cause appearing therefor, It Is Hereby Ordered that the time within which the defendant United States of America may file the record and docket the above entitled case in the United States Circuit Court of Appeals for the Ninth Circuit in its appeal from the final judgment entered in this action on August 20, 1945, and subsequently amended by stipulation on the 4th day of October, 1945, be and the same hereby is extended to and including February 16, 1946.

Dated: This 27 day of December, 1945.

BEN HARRISON
District Judge

[Endorsed]: Filed Dec. 27, 1945. [77]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

Whereas, the defendant in the above entitled action has taken an appeal from the judgment in this case to the United States Circuit Court of Appeals for the Ninth Circuit, and the record consists, among other things, of several written exhibits which were introduced in evidence by the parties;

Whereas, it is the desire of the parties hereto, in order to save time, labor and expense of making photostatic

copies, to facilitate printing and to permit inspection by the Appellate Court of the originals, that said original documents be sent to the said Court in lieu of copies;

Now, Therefore, it is hereby stipulated and agreed, by and between the parties, through their respective counsel undersigned, that the originals of all of plaintiff's and defendant's exhibits be sent to the Appellate Court in lieu of copies thereof. [81]

Dated: this 30th day of January, 1946.

CHARLES H. CARR EH
United States Attorney

E. H. MITCHELL EH
Asst. U. S. Attorney

GEORGE M. BRYANT EH
Asst. U. S. Attorney

EUGENE HARPOLE
Special Attorney
Bureau of Internal Revenue
Attorneys for Defendant-Appellee

LESLIE L. HEAP
Attorney for Plaintiff-Appellant

It Is So Ordered this 31 day of Jan. 1946.

BEN HARRISON
United States District Judge

[Endorsed]: Filed Jan. 31, 1946. [82]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It is stipulated by and between counsel for the respective parties hereto that the reporter's transcript of the hearing of the above entitled matter at the time of submission on the 31st day of July, 1945 may be included in the record on appeal herein.

Dated: February 1, 1946.

CHARLES H. CARR E.H.

United States Attorney

E. H. MITCHELL E.H.

Asst. U. S. Attorney

GEORGE M. BRYANT E.H.

Asst. U. S. Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Defendant-Appellant

LESLIE L. HEAP

Attorney for Plaintiff-Appellee

[Endorsed]: Filed Feb. 5, 1946. [83]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 83 inclusive contain full, true and correct copies of Complaint for Recovery of Individual Income Taxes

and Interest Thereon; Answer; Minute Orders Entered May 8, 1945, May 14, 1945 and June 14th, 1945 respectively; Notice of Motion for Judgment on Pleadings; Motion for Judgment on Pleadings; Plaintiff's Reasons and Points and Authorities in Support of Motion for Judgment on Pleadings; Defendant's Memorandum of Points and Authorities in Opposition of Motion for Judgment on the Pleadings; Plaintiff's Reply to Defendant's Memorandum of Points and Authorities Opposing Motion for Judgment on Pleadings; Minute Orders Entered July 2, 1945, July 5, 1945 and July 31, 1945 respectively; Stipulation of Facts; Minute Order Entered August 2, 1945; Memorandum Opinion; Minute Order Entered August 20, 1945; Findings of Fact and Conclusions of Law; Memorandum re Interest in Judgment; Judgment for Plaintiff; Stipulation for Amendment of the Judgment; Amended Judgment for Plaintiff; Notice of Appeal; Order Extending Time to Docket Cause on Appeal; Appellant's Designation of Record on Appeal; and two Stipulations re Record on Appeal which, together with Original Exhibits A to E inclusive and copy of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of February, A. D. 1946.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke
Chief Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * *

Los Angeles, California, July 31, 1945;

10:00 o'clock a. m.

The Court: Are you ready to proceed, gentlemen?

Mr. Heap: We are ready, your Honor.

Mr. Harpole: The Government is ready.

The Court: You may proceed.

Mr. Heap: Your Honor, we spent a great deal of time trying to arrive at a statement of facts. Your Honor knows when we started out in this thing that was the intention but a question arose because there were certain facts leading up to the making of the documents which we thought were a part of the facts and the Court ought to have all of the facts and not just a part of the facts.

I have here two copies of a stipulation in connection with which we have certain exhibits which we have not attached but we referred to them here and we have the exhibits which we will put in.

We made this stipulation. It was rewritten a number of times and we think we both understand it. We know what is intended by it and I don't think there is going to be any question concerning it at all.

The Court: May I see the stipulation?

Mr. Heap: Yes, your Honor. When we prepared it the last time we did not know whether there was one paper that is referred to in there, I think on page 3, whether it existed [2*] or not but I find, apparently, we

*Page numbering appearing at top of page of original Reporter's Transcript.

have discovered that it did so we will not have to modify it in that connection at all.

May I say this, Mr. Harpole and I agreed on this point that by making the stipulation the parties are not stipulating to the truth of the statements in the documents. We are putting the documents in.

There is one document which we have stipulated Mrs. Gavin signed as a part of the settlement arrangement but we did not want her to stipulate to the truth of the statements in that document because we would be asking her to say something which she would feel was untrue.

Now, we had intended this morning, I told Mr. Harpole yesterday, subject to any proper objections, to have two witnesses here—Mrs. Gavin and her husband.

All last week and up to the present time both of them have been quite seriously ill. I talked to Mrs. Gavin twice yesterday and I thought she was going to make it. The doctor gave her some hypos last night and the nurse this morning refused to let me talk to her so I cannot get her in here this morning at all.

Let us put in the exhibits and then the Court will know what we are talking about.

The Court: Let me read this stipulation. You may introduce the exhibits, whoever has them.

Mr. Heap: Yes, your Honor, paragraph 4, an exhibit [3] which we have indicated would be marked Exhibit A, which is the Supreme Court opinion.

The Court: Is it necessary to introduce that into the record, gentlemen? Can't we take judicial notice of that instead of building up a big record?

Mr. Heap: We wanted to have it in. We discussed it and decided it would be more convenient. It is not terribly long.

The Court: It will be admitted.

The Clerk: Plaintiff's Exhibit A.

(The document referred to was received in evidence and marked Plaintiff's Exhibit A.)

Mr. Heap: And Exhibit B I think Mr. Harpole has, is that correct?

Mr. Harpole: Yes.

Mr. Heap: I have only a copy on yellow paper. This is the statement referred to as Exhibit B.

I think, Mr. Harpole, you have a portion of Exhibit C. There are three papers in that. Maybe it would be better to mark them C-1, 2 and 3 or clip them together and mark them under one exhibit number.

The Court: There are different ones referred to. The document designated "Agreement," dated February 28, 1934, will be marked B.

(The document referred to was received in evidence and marked Plaintiff's Exhibit B.) [4]

Mr. Heap: In paragraph 4 we have three different papers which we have indicated may be marked Exhibit C but if the Court thinks it would be more convenient we might refer to them as C-1, C-2 and C-3.

The Court: You have a stipulation marked Exhibit C and I think those documents should be so marked.

Mr. Heap: All right.

(The document referred to was received in evidence and marked Plaintiff's Exhibit C.)

Mr. Heap: We also stipulate that the documents in Exhibit C are correct copies but they will be subject to correction if we find they are not. We think they are. One of them just came in and we have had no opportunity

to determine whether it is an accurate copy or not. We think it is.

The decree of distribution, Exhibit D referred to in paragraph 5 at the bottom of page 3 of the stipulation, and to this is attached a copy of the will, it is a part of the decree of distribution, so it should go in with it, and may we say that with reference to Exhibit B in the body of it it refers to a certain paper which is not attached to this exhibit but that is a copy of the will that is attached to it now. We have a copy of the will attached to the decree so Mr. Harpole and I figured just so it is understood that Exhibit B is complete except that it does not have a copy of the will attached to it, but there is a copy of the will attached to [4] the decree.

Exhibit E is a certified copy of the tax return with some statements attached to it. The only other exhibits referred to in the stipulation are the two exhibits which are attached to the complaint. Those are mentioned in paragraphs 8 and 9 of the stipulation but they are not to be introduced separately. They are already attached to the pleadings that are in.

It is my understanding with Mr. Harpole that this stipulation covers the facts but does not necessarily cover all the facts that are admitted by the pleadings. It may overlap and cover some of the facts that are admitted by the pleadings, but I do not believe that either of us have verified the fact of whether it covers each and every one of the facts that are set forth in the pleadings.

In other words, the stipulation is not intended to exclude any facts that are admitted by the pleadings.

Mr. Harpole: That is true, your Honor. The stipulation only covers the facts that it mentions and any-

thing that is admitted in the pleadings we, of course, stand by that.

Mr. Heap: Now, there is one thing perhaps should be cleared. I think it is clear in the record as it stands. In the stipulation certain persons are referred to at the top of page 4, or her assignees.

Under the decree of distribution as shown by the stipulation [5] here and by the decree, substantially half of the property which was given in settlement was distributed directly to the persons designated in the stipulation as her assignees.

In the stipulation or statement of facts as I previously prepared it, I indicated who those persons were but I think Mr. Harpole will stipulate with me that they were her investigator and an attorney who handled that case for her.

Mr. Harpole: That is true.

Mr. Heap: Now, as I say, your Honor, we intended to have some witnesses here this morning.

The Court: What witnesses and for what purpose?

Mr. Heap: I was just going to say. And it may be that Mr. Harpole would stipulate with me or we can determine what to do about it. While all of the papers here bear the date of February 28, excepting that tax return, which would indicate that they were made and dated on the 28th of February 1934, I wanted to clear that fact so there wouldn't be any doubt about it as to showing that all of those papers were prepared in connection with the settlement arrangement prior to the 28th of February 1934 and dated that date. That is, they were all prepared as a part of the settlement arrangement and passed upon and approved by the parties and that all of the settlement—that is, all of the papers

were all used at the same time. I believe that is shown by the minutes that I [6] have introduced.

Mr. Harpole referred to the Exhibit B, I believe it is, as being in the nature of a declaration against interest.

The Court: Let us get the evidence in and then we will have the arguments.

Mr. Heap: I wasn't going to argue. I was going to say why he referred to that as a declaration against interest which on the face of it it appears to be and for that reason—in other words, one of the papers that was prepared in connection with the settlement as a part of the settlement she was to—

The Court: That is a part of the settlement, isn't it?

Mr. Heap: That is right.

The Court: And it isn't a separate document?

Mr. Heap: It is a separate paper but it is one of the papers that was made in connection with the settlement. It is listed as No. 3 on page 3 of the stipulation.

The Court: And that is the agreement of—

Mr. Heap: It is designated as an agreement. It is signed only by one person. We finally determined on using the word "document" designated "A" as an agreement.

The Court: Is that the part that states she will not at any time assert her claim?

Mr. Heap: That is correct. And in the first part of it she makes statements which are diametrically opposed to her [7] claims and contentions in the estate and I felt that in view of the fact that it appeared to be a paper signed by her which stated things contrary to what she had alleged in the case, that her testimony in connection with it would be proper to explain whether

or not the statements there were true and why she signed them.

The Court: She just waived her claim, didn't she, either to claim or assert for herself and her heirs.

Mr. Heap: That is right. Let me say this. I think I can clear it satisfactorily. When the settlement was arranged she agreed to sign that paper for two purposes. One was to create a bar to future claims, to definitely settle the thing and as we have stated in our stipulation so that that paper could be used to support a judgment against her and they brought the matters on and, as the minutes show, the judgment was made and the decree of distribution and the three accounts and the final account were all done and the distribution at the same time on the statement of counsel for the respondents, and the other attorneys for her were there and they said nothing. They came in in pursuance to the settlement arrangement and allowed that to be done and it was carried out. I don't think we have any dispute on it. The only thing was that Mr. Harpole on some things says he did not personally have any knowledge as to some of the things and therefore didn't want to stipulate to them. [8]

Mr. Harpole: We cannot stipulate to the things leading up to the settlement. They are not in writing.

The Court: The settlement takes the place of the negotiations anyhow.

Mr. Harpole: The Government relies on the written documents that evidence the settlement.

The Court: Gentlemen, the case simply resolves itself down to this legal proposition: Where a person who claims to be an heir without any determination of heirship enters into a settlement and under a decree of distribution receives a portion of the estate, is that which

he receives income or is it exempt under the statute? Isn't that the sole question? The same question we argued before.

Mr. Harpole: That is the way we see it. It is simply a question of whether she received an inheritance or received something else. Everybody agrees she got the money out of the estate. There is no dispute about that and no dispute about how much.

The Court: She received it through the decree of distribution by virtue of a settlement with a portion or with all the beneficiaries of the estate.

Mr. Harpole: By virtue of the settlement and judgment—the judgment that preceded the decree of distribution. It was made on the same day.

The Court: Is there any portion of that decree of dis- [9] tribution that should be called to the Court's specific attention? It is all right to hand a document of a good many pages, and most of it being recitals—

Mr. Heap: I think I can clear that in the Court's mind. Pursuant to what I have stated and the stipulation the parties agreed that they would allow this petition of hers to come on without contest and they did that. Mr. Roach made the statement as shown by the minutes there.

The Court: Where are the exhibits?

Mr. Heap: Exhibit C, the top paper.

The Court: Let me read this exhibit. It says "The same is denied."

Mr. Heap: That is right. Pursuant to the agreement they went in and allowed the consent judgment to be made and then the decree of distribution recites in exactly the same language as the last page of the findings and conclusions and then proceeded to distribute the property to her.

The Court: Did that occur all on the same date?

Mr. Heap: That is right, as indicated by the minutes. They did all those things at the same time. It was all prearranged. Instead of dismissing with prejudice they went in and—

The Court: And the Court found she was not a daughter?

Mr. Heap: That is right.

The Court: Is there anything more to be said about this [10] case that hasn't already been said in our discussion before and in the briefs that have been submitted?

Mr. Harpole: I think perhaps there is a case or two that have some bearing that have not been discussed. At least there was one case in existence which perhaps was not cited at the time of our last distribution which has been reversed by one of the Circuit Courts since that time. That was *Dumont v. Commissioner*. That was reversed by the Third Circuit on the 11th of this month.

The Court: Where was that?

Mr. Harpole: Went up from the Tax Court.

The Court: What is the citation?

Mr. Harpole: Tax Court, page 158. It is quite a recent case. 41 Board of Tax Appeals and 31 Board of Tax Appeals. The 41 Board of Tax Appeals was the Keller case and the 31 was the Kearney case.

Incidentally, your Honor asked us at the last hearing whether the Keller case in 41 had been acquiesced in and I have since checked and it has.

The *Dumont* case also refers to the Third Circuit opinion. It refers to it in 122 Fed. (2d) 480.

The Court: What was the last citation you said that was just recently reversed?

Mr. Harpole: In the tax service. It is paragraph 72617.

The Court: Do you have it with you? [11]

Mr. Harpole: I do. I have the decision. I will be glad to leave it with your Honor.

The Court: Where does this help us?

Mr. Harpole: There is considerable discussion down in the body of the opinion about the necessity of a person who seeks to come within the exemption having an actual standing as an heir or legatee.

Mr. Heap: Which case is that?

Mr. Harpole: Dumont case.

Mr. Heap: You have cited that before.

The Court: The decisions are to the effect that we are to look at the substance and not the form. In this case we have a bona fide contest. There was a real close question—so close that the Supreme Court sent it back for retrial after the Superior Court had directed a verdict and before retrial the parties settled and executed a number of papers and if the parties are to be bound by these papers they ought to have sued for obtaining money under false pretenses because under your own claim here she was not entitled to anything.

If there is nothing more, gentlemen, the case will stand submitted.

Mr. Harpole: Do you wish to keep the opinion in the Dumont case?

The Court: No, because I have read the syllabus. The 41 Tax Court case does not seem to be in accord with it. I [12] will be glad to read it over.

Mr. Heap: It specifically upholds the Keller case.

The Court: I want to say frankly this is the first time I have been involved in a tax case where a compromise settlement has been entered into. The Court recognizes that compromises are favored under the law but is it going to be that every time parties make settlements they are going to be subject to review under our tax procedure? It seems to me, in view of the Government's position in this case, the Government should also go after the other parties because you are in this situation—if this plaintiff was a daughter and only received two-thirds of that to which she was entitled the other heirs or beneficiaries received more than they were entitled to.

Mr. Harpole: I think, your Honor, in this case it was not the other heirs that got it. It was a charitable institution that received it.

The Court: But are we going to in this court rehash compromises and retry them to determine who was entitled to the property and who was not in order to determine income? Not now in an estate matter like this, under the present rate of taxation; it would have been impossible for these people to have settled because the taxes would have consumed the entire estate.

Mr. Harpole: What I was starting to say was the Govern- [13] ment would not go after the people that got the rest of the money because that distribution was exempt anyway. It went to charity.

The Court: That may be the case in this proceeding.

Mr. Heap: Some of it—not all of it.

Mr. Harpole: You will find in the Sage case where the thing that you suggested should be done was done. The Government did tax a charity. It was Amherst College.

The Court: They tried to.

Mr. Harpole: And it succeeded in that case.

The Court: Is there any particular part of these documents that you gentlemen specifically desire to call the Court's attention to? I understand the part of the agreement that you are relying upon is where she covenants not to make any claims as an heir and the judgment of the Court finding that she was not an heir, in Exhibit C. That is the part, is it not, that you are relying upon—that she was in fact not an heir?

Mr. Harpole: The findings of facts, conclusions of law, the judgment and the decree of distribution all make the finding that she was not the child of Flood, and also that Flood left two children and that he left no other decedents.

The Court: The case will stand submitted, gentlemen.

(Whereupon the above-entitled matter was concluded.) [14]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8 day of February, A. D. 1946.

JACK D. AMBROSE,
Official Reporter

[Endorsed]: Filed Feb. 8, 1946. [15]

[PLAINTIFF'S EXHIBIT A]

In the Supreme Court of the State of California

(In Bank—April 18, 1933)

In the Matter of the Estate of James L. Flood, Deceased.

Petition of Constance May Gavin for Partial Distribution.

Constance May Gavin, Appellant, v. The Protestant Episcopal Bishop of California (a Corporation Sole) et al., Respondents. S. F. No. 14581.

Langdon, J.—

This is an appeal by petitioner, Constance May Gavin, from a decree of the probate court denying her application for partial distribution. The sole question presented to this court is whether the case should have been submitted to the jury, the court having directed a verdict against petitioner and in favor of respondents. In our opinion, the court erred in so doing, and the judgment must be reversed.

The decedent, James L. Flood, died testate, leaving a surviving widow, Maud Lee Flood, and two children, Mary Emma Stebbins and James Flood. The estate, appraised at \$8,565,507.85, was by the terms of his will distributed among said widow and children, Cora Jane Flood, a sister of the decedent, since deceased, and various charitable institutions, respondents herein. Petitioner alleged that she was the illegitimate daughter of the testator, and claimed a share ($\frac{2}{9}$) of the estate as a pretermitted heir, under Probate Code, section 90 (formerly sec. 1307 of the Civil Code). Respondents answered, and a trial was had before a jury. At the close of all the

(Plaintiff's Exhibit A)

evidence, upon motion by respondents, the trial court directed the jury to bring in a verdict against petitioner and in favor of respondents. Judgment was accordingly entered thereon, denying the application for partial distribution. A motion for a new trial was made and denied. Thereupon petitioner brought this appeal from the judgment and order denying the motion for new trial.

Probate Code, section 255, is not involved in this proceeding, petitioner's claim being based upon legitimation under section 230 of the Civil Code, which reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth . . ." To establish her claim of legitimation under this section as construed by a number of decisions of this court, petitioner must sustain the burden of proof of the following elements: (1) Illegitimacy: that she is an illegitimate child; (2) paternity: that James L. Flood was her father; (3) public acknowledgment: that he publicly acknowledged her as his own child during her minority; (4) reception into the family with wife's consent: that she was received into his family with his wife's consent, given with knowledge of the illegitimacy (5) treatment as legitimate: that he otherwise treated petitioner as if she were his legitimate child. (See, generally, *Estate of Baird*, 193 Cal. 225 [223 Pac. 974]; *Estate of Gird*, 157 Cal. 534 [108 Pac. 499, 137 Am. St. Rep. 131]; *Estate of Jones*, 166 Cal. 108 [135 Pac. 288].) It is admitted by the pleadings that petitioner

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is an illegitimate child, the daughter of Eudora Helen Forde Willette, born out of wedlock May 11, 1893, at San Francisco. The evidence is also undisputed that petitioner was received into the family of James L. Flood with the consent of his wife, and lived there for some time during her youth, where she was treated as if she were his legitimate child. The controversy, therefore, centers about the three remaining elements, paternity, public acknowledgment, and knowledge of Mrs. Flood of petitioner's illegitimacy.

Before proceeding to discuss the evidence, it is necessary to set forth the rule governing the power of the trial court to direct a verdict. This matter has been before the courts of this state on numerous occasions, and the principles were recently reviewed in *Estate of Lances*, 216 Cal. 397 [14 Pac. (2d) 768], wherein this court said (p. 295):

"It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given'. (*Newson v. Hawley*, 205 Cal. 188 [270 Pac. 364]; *Perera v. Panama Pacific Int. Exp. Co.*, 179 Cal. 63 [175 Pac. 454]; *Estate of Sharon*, 179 Cal. 447 [177 Pac. 283]; *Estate of Gallo*, 61 Cal. App. 163, 175 [214 Pac. 496]; 24 Cal. Jur., pp. 912-

(Plaintiff's Exhibit A)

918.) Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. (Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228 [263 Pac. 799].) A motion for a directed verdict 'is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom . . . Even though a court might be justified in granting a new trial it would not be justified in directing a verdict on the same evidence . . . The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict . . . If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict.' (Hunt v. United Bank & Trust Co. of California, 210 Cal. 108, 117, 118 [291 Pac. 184, 188].) In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. *Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a*

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motion for a new trial, it may not do so on a motion for a directed verdict." (Italics ours.)

Two important propositions should be noted in the above quotation. First, the trial court, on a motion by a defendant for a directed verdict, cannot weigh all the evidence introduced by both sides; all evidence in conflict with the plaintiff's evidence must be disregarded. Second, the trial court, in determining such motion, cannot judge the credibility of witnesses, but must give to the Plaintiff's evidence all of the value to which it would be legally entitled if the witnesses were believed. If extraordinary situations may be conceived in which these rules would yield to exceptions, the instant case is not one of them, and it must be governed by the rules, which must now be considered as settled in this state by a long line of authorities. (See, also, *Topley v. Zeeman*, 216 Cal. 182 [13 Pac. (2d) 666]; *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 552 [299 Pac. 529]; *Bannister v. Los Angeles Ry. Corp.*, 203 Cal. 427 [264 Pac. 631]; *Estate of Caspar*, 172 Cal. 147 [155 Pac. 631].) Such cases as *Diamond v. Weyerhaeuser*, 178 Cal. 540 [174 Pac. 38], where the court found the case for the plaintiff wholly lacking in the elements to justify recovery, and therefore held it proper to direct a verdict, are not inconsistent with these rules. We proceed, then, upon the basis that petitioner was required merely to offer competent evidence of such a substantial nature that it might reasonably be inferred therefrom that she was the illegitimate daughter of James Flood, legitimated in conformity with Civil Code, section 230.

Certain facts constituting the background of this case must be briefly stated. Mrs. Alfredeta Forde, a widow,

(Plaintiff's Exhibit A)

came to California from Boston with her daughter Eudora Helen Forde (now Eudora Forde Willette), and her son Ferdinand David Forde, in 1891. They lived in Los Angeles until June, 1892. They were in constant financial distress. The mother, a former actress, attempted to support her daughter by giving dramatic readings, and the son, a violinist, occasionally was engaged to play at dances and banquets. Later, the daughter commenced her theatrical career with a stock company. According to her testimony they met a "Dr. Victor Sturm" in Los Angeles, who represented himself to be a retired physician from the east. In June, 1892, Mrs. Forde and Eudora came to San Francisco, Ferdinand following shortly afterward. They stayed at the Russ House, a hotel, for about a month. Eudora testified that Dr. Sturm then arrived, that they became engaged, that she ordered a trousseau for which he was to pay, and that he then disappeared, leaving them with numerous unpaid debts. They moved to the Grosvenor, and then to the Langham hotel, at Ellis and Mason Streets. For a short time, Mrs. Forde was engaged as an actress at the Grove Street theater, on Grove between Polk Street and Van Ness Avenue. The mother and daughter moved from the Langham to a boarding-house, and changed lodgings again several times thereafter.

While living at one of these houses Eudora discovered that she was pregnant. She testified that she consulted a priest concerning her plight, asking whether she might not take the name of a married woman; that he permitted her to do so, telling her that she could treat the matter as a spiritual marriage; that she thereupon took the name of "Mrs. Stearn", which, she says, was familiar

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to her as the name of a department store in Boston. In April, 1893, Mrs. Forde and Eudora rented a room at 628 Eddy Street, and early in May moved next door to a boarding-house at 626 Eddy Street. On May 11, 1893, Eudora gave birth to a daughter. On May 19, 1893, the child was baptized and a baptismal record made, in which the child's name was entered by the priest as "Constans Marguerite Stern", and the parents' as "Eudora Ford" and "Victor Stern". The name actually given to the child, petitioner herein, was Constance Marguerite Stearn.

In August, 1893, when the child was about three months old, she was taken into the family home of James L. Flood at 1890 Page Street. He was then thirty-six years of age, had been married to Marie Rose Flood for six years, and had no children. Upon the reception of the child into the Flood family, the financial condition of Mrs. Forde and Eudora improved considerably, many of their bills being paid and large additional sums being given them from time to time. The Floods changed the child's name from "Constance Marguerite" to "Constance May", and she was known as "Constance May Flood". Some time prior to May, 1894, Mrs. Flood acquired a summer home at Alma, Santa Clara County, where she lived with her husband and petitioner during the summer. In August, 1896, she secured a residence at 1816 Pacific Avenue, San Francisco. On January 15, 1898, Mrs. Flood died. Shortly thereafter, on February 23, 1898, James Flood made a trip to the Orient, taking with him his sister-in-law, Maud Lee Fritz, and brother-in-law Walter Fritz, Constance, and a valet and maid. He returned June 7, 1898. At the conclusion of the trip, Maud

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and Walter Fritz remained with him at Alma, and their parents, Mr. and Mrs. John Fritz, and their brothers, John and Beaumont Fritz, came out from their home in Kansas City at Mr. Flood's invitation. Mr. Fritz, John and Beaumont spent the summer and part of the fall there, and Mrs. Fritz, Maud and Walter stayed until January 1, 1899, when they went to Kansas City accompanied by Mr. Flood and Constance. It was arranged that Mrs. Fritz was to rear Constance in her home, and Flood thereupon left her and returned to San Francisco. He went back to Kansas City and soon afterwards, and on February 9, 1899, was married to Maud Lee Fritz, sister of his deceased wife. They went to Europe, returned and established their home at Menlo Park, San Mateo County. A child, Mary Emma, was born to them on July 7, 1900. Constance remained in Kansas City with the Fritz family until July, 1901, attending St. Theresa's Academy there for a time.

Some time in July, 1898, Colonel Henry I. Kowalsky, an attorney representing Mrs. Forde and Eudora, sought to obtain money for them from Mr. Flood. On August 1, 1899, Flood paid to Colonel Kowalsky for Eudora, the sum of \$5,000, receiving from him a document entitled "Declaration of Abandonment", which was an affidavit of Eudora Forde, stating that Constance was the child of herself and her husband "Edward Stearn"; that her husband had died in New York in 1894; and that she had abandoned the child and relinquished all claims to its custody and control. Of the \$5,000 thereby received for Eudora, Colonel Kowalsky retained \$1200 as his fee. The statements in this affidavit respecting parentage were admittedly false, and Eudora testified that she did not

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know what she was signing. She further testified that Flood knew her under the name of "Miss Dora Forde".

Shortly before July, 1901, Mrs. Forde wrote to Flood on behalf of herself and Eudora, asking that Constance be returned to them. After consultation with his attorney, Mr. Flood had Constance brought to San Francisco. On July 13, 1901, a meeting was held at Mr. Flood's office, at which Flood, according to evidence presented by respondents offered either to return the child, or to educate her during her minority. The latter arrangement was decided upon, and on July 22, 1901, Constance was taken by her nurse to "Ramona Convent" at Shorb (now Alhambra), Los Angeles County. Flood paid the sum of \$7,000 into a trust fund for her expenses for a period of ten years. She remained a boarder in the convent until June, 1911, and was there known as "Constance May Stearn". While there, she became intimate with the two daughters of Senator Robert N. Bulla, frequently spending her week-ends with them. At the conclusion of the ten-year period, she left the convent and went to live at the home of Senator Bulla. He lived in Alhambra with his two children and his sister-in-law, Mrs. Bertha Welfare. Constance made her home there for over nine years, receiving her board and lodging, and a monthly allowance from him of thirty dollars for clothing and incidentals, which was the amount given by him to each of his daughters.

Some time in 1917 petitioner became engaged to be married to John P. Gavin, her present husband, and on April 16, 1917, she wrote to Mr. Flood asking information as to her parentage. Receiving no reply, she wrote again on May 17, 1917. Thereafter, in June, 1917, James

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E. Walsh, Mr. Flood's secretary, called at Senator Bulla's home, and told her that according to Mr. Flood's information she was the daughter of Edward Stearn and Eudora Forde Stearn. Upon his return, Walsh sent her, in care of Senator Bulla, an extract from the affidavit of Eudora, to the same effect. After leaving Senator Bulla's home, petitioner was employed for some time as a domestic servant in Los Angeles. On May 11, 1921, when she was twenty-eight years of age, she was married to John P. Gavin at Los Angeles, and has lived there with her husband ever since. On November 30, 1922, being ill and in financial distress, she wrote to Mr. Flood, telling of her condition and appealing for aid, but received no reply. In 1918 and 1923, when visiting San Francisco, she attempted to see Mr. Flood, but in each instance was informed that he was out.

James Flood died February 15, 1926. About two months later, petitioner visited in San Francisco, and consulted a firm of attorneys as to her possible right to a share in the estate. Thereafter various investigations and conferences took place, resulting in the commencement of this proceeding.

It is the theory of petitioner that James L. Flood met Eudora Forde soon after she came to San Francisco, had sexual relations with her, that petitioner was the result of the union, and that Flood and Mrs. Flood took her into their home with knowledge of these facts. Respondents advance the theory that Eudora Forde, while accompanying her mother to the Grove Street theater at this time, met James S. Cannon, the property man (who died subsequently in 1911), became intimate with him, and that he was the father of petitioner. According to

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this theory petitioner was taken into the Flood household as an act of charity by Mrs. Flood, who secured her husband's consent thereto. Both theories find their origin, to some extent, in the statements of Eudora Forde Willette, who from 1926 to 1931 persistently maintained to representatives of petitioner and of respondents, to newspaper men and to others, that Flood was the father, and subsequently testified at the trial that Cannon was the father. As will hereinafter appear, the testimony of this witness is unimportant on this appeal, for at most it creates a conflict with petitioner's case which must be disregarded in *determining* the propriety of the court's direction of the verdict. Moreover, it is impeached by prior inconsistent statements and by her conduct to such an extent that the jury might have disbelieved it, and her credibility should have been determined by the proper course of submission of the case to the jury. It was the admitted practice of this witness to maintain herself at the expense of the parties to the litigation. One witness, for example, testified that she told him on one occasion that Aureguy (petitioner's investigator) was behind in his payments, and that she might jump to the other side of the case. She denies making this statement, although the fact is that she did "jump" (because she became conscience-stricken, according to her testimony), and thereafter she received regular remittances from representatives of respondents.

We come now to the case for petitioner, the question being whether the testimony presented by her and all reasonable inferences therefrom, sufficiently establish the elements of legitimation set forth above. Her evidence falls into three classes: (1) Declarations and acts of Mr. Flood; (2) declarations and acts of Mrs. Rose Flood;

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(3) declarations of others, which the trial court excluded.

Numerous witnesses, including servants, friends, neighbors and casual acquaintances, testified to the conduct and statements of Flood with respect to petitioner. He was greatly attached to the child, played with her constantly, embraced and kissed her frequently and affectionately. Photographs were introduced in evidence, showing the child at the table, or seated with Flood. He provided her with beautiful clothes, toys and trinkets. She was known in the household and among friends as "Baby Flood". She had visiting cards with the name "Constance May Flood" engraved thereon. A flower bed on the Alma estate contained the same name, and various trinkets carried her initials as "C. M. F." Packages and telegrams were received and sent in the name of Constance May Flood. Flood called her "baby", "my daughter", "my little daughter", "my little girl", "my darling daughter"; she called him "papa". He would take the child in his arms and say: "Who does sweetheart look like?" She would answer: "Papa". Their coachman testified that on one occasion when Flood was in the carriage with the child, he said to her, "Baby, what is papa going to have when we get up to the ranch?" She replied, "Whiskey and soda", and Mr. Flood said, "Baby knows what is good for papa". On his trip to the Orient, petitioner was constantly in his company. To the officers and passengers he made the same sort of declarations as he had made at his home, continually referring to the petitioner as his "daughter" or his "little daughter". The passenger lists of the "S. S. Belgic" and the "S. S. Gaelic", on which they traveled, read:

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"Miss Constance M. Flood", and the captain's manifest of the "S. S. Belgic" read: "Miss C. M. Flood, 5, female, with father, J. L. F." On board the "Gaelic" he met an old friend, who asked him, "Whose child is that?" Flood replied: "It is my own. Doesn't she resemble me?" In Kobe, Japan, he placed the child on the hotel counter saying: "This is my baby, my Constance. my baby Constance May Flood; she can sing in French". Upon the return trip, Flood had printed and published at his expense a newspaper called "Sayonara", recording the events of the trip, and sent copies to all of the officers and passengers. In it was a picture of petitioner as "Miss Constance M. Flood", and the poem: "The Belgic Alphabet", containing the line: "F—is for Flood and his sweet little daughter".

The conduct of Mrs. Rose Flood was equally affectionate. As did the rest of the household, she called the child "baby Flood" or "Sunshine", and was present on many occasions when Flood referred to the child as his "daughter". One of the declarations of Mrs. Flood, which is chiefly relied upon by petitioner, appears in the testimony of Mrs. Adele Gahan, formerly Adele Cerles, nurse in charge of the child at Alma, during the ocean trip, and then at the Pacific Street home. She testified that in July or August, 1897, Mrs. Flood gave her an envelope containing money, and told her to take it to a "Miss Ford" on Mason Street; that she took the child with her to the place, inquired for the woman, and was told by an elderly lady that she was not in, but that she (the elderly lady) was the mother of the woman; that she gave this person the money, and that the lady then tried to coax the child to her, and after some effort said: "Isn't it too bad she doesn't know her grandmother?"

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Upon her return, the witness testified, she told Mrs. Flood of the incident, and Mrs. Flood said to her: "Adele, I am going to tell you something, but on your word of honor you must promise that you will never reveal it to anybody. Baby Constance is the daughter of my husband, Mr. Flood, and Miss Ford, and Miss Ford is the mother."

The above evidence constituted the main case for petitioner. No attack was made upon the admissibility of this evidence, and the competency of such acts or declarations concerning family history (pedigree) is clearly established by statute and case law in this state. Section 1870, subdivision 4, of the Code of Civil Procedure makes admissible "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person . . ." Section 1852 of the same code provides: "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible." Section 1870, subdivision 11, provides that "Common reputation existing previous to the controversy" is admissible in cases of pedigree. Under these sections, the acts and declarations of both Mr. Flood and Mrs. Rose Flood are competent to prove the paternity of petitioner. In *Estate of Heaton*, 135 Cal. 385 [67 Pac. 321], a situation similar to that involved herein was presented, and the court said: "One of the facts absolutely necessary to support the claim of legitimation is that Warren D. Heaton was the father of Jennie. Jennie came to the family of Mrs.

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Ruth May when but an infant. A few years later Heaton and Mrs. May were married. Thereafter Jennie became a member of the family of Warren D. Heaton and his wife. Being *a member of their family*, the declarations of *either* were competent and relevant evidence upon the question of Jennie's paternity." (Italics ours.) (See, also, Estate of Hartman, 157 Cal. 206 [107 Pac. 105, 21 Ann. Cas. 1302, 36 L. R. A. (N. S.) 530]; In re Clark, 13 Cal. App. 786 [110 Pac. 828]; Estate of McNamara, 181 Cal. 82, 100 [183 Pac. 552, 7 A. L. R. 313]; 3 Wigmore, Evidence, sec. 1489, p. 226.)

The admissibility of this type of evidence being demonstrated and conceded, respondents' position is simply that the acts and declarations admitted in this case are not sufficient to establish the elements of legitimation, and particularly the element of paternity. Their principal contention is this: The declarations of a married man living with his wife, to the effect that a child in their home is his or their child, import that the child is the legitimate child of himself and his wife, and do not afford evidence that the child is the husband's illegitimate child. Starting with this proposition, they describe the statements of Mr. Flood as declarations that petitioner was his legitimate child, born in lawful wedlock, and not competent to show that she was his illegitimate daughter. In support of this theory, respondents offer sociological data on the common practice of married persons taking strange children into their homes, and also cite authorities, of which the following is typical: "The rule cannot be stated too broadly, that the description, 'child, son, issue', every word of that species, must be taken *prima facie* to mean legitimate child, son, or issue". (Wilkinson v. Adam, 1 V. &

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B. 422, 462, 35 Eng. Rep. 163, 179.) The effect of these authorities would no doubt be that if petitioner were here claiming to be the legitimate child of James Flood, his declarations to the effect that she was his child would afford an inference of both parentage and legitimacy. But there is no authority which holds that these declarations mean legitimacy or nothing, and common sense would rebel against a notion so unreasonable. The rational view must necessarily be this: Flood's declarations were evidence of paternity, i. e., evidence that he was the father of the person whom he addressed and described as his "child" and his "daughter". In the absence of any other evidence, the inference would normally be that she was his legitimate child. But here the undisputed evidence shows, and the pleadings of all parties admit, that Eudora Forde and not Rose Flood was the mother of the child, and it follows that the inference of paternity, if drawn by the jury, would be an inference of illegitimacy and not legitimacy.

Looking at respondents' argument from another point of view, it would wholly prevent the proof of legitimation under Civil Code, section 230, by declarations and acts of a father who was married, for if he referred to the person merely as his child, this would not afford proof of illegitimacy, and if he referred to the person as his illegitimate child, this would constitute a failure to treat the child as legitimate, a positive requirement of the section. Thus, in *Estate of De Laveaga*, 142 Cal. 158, 168 [75 Pac. 790, 794], the court says: "But Jose Maria never received him into his family, or into or among his kindred, and did not treat respondent as if he were a legitimate child, but, on the contrary, *treated him and referred to him as an illegitimate child.*" (Italics ours.)

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To require reference to the child as illegitimate would, therefore, prevent legitimation and defeat the very object of the statute. Analogous cases reject such a requirement. In *Blythe v. Ayres*, 96 Cal. 532 [31 Pac. 915, 19 L. R. A. 40], speaking of acknowledgment of an illegitimate child for purposes of inheritance, the court says (96 Cal. 589): "Blythe, in writing, acknowledged himself to be the father of Florence Blythe; Florence Blythe is an illegitimate child; therefore Blythe acknowledged himself to be the father of an illegitimate child. This logic is unassailable and no sound reason can be adduced why the acknowledgment should contain a declaration of bastardy." (See, also, *Estate of Loyd*, 170 Cal. 85 [148 Pac. 522].) We conclude that on the question of paternity the jury should have been permitted to determine the effect of the acts and declarations set forth above.

The second disputed issue relates to the element of knowledge by Mrs. Flood that petitioner was the illegitimate child of her husband. The evidence upon which petitioner relies is of two kinds. First are the declarations of James Flood, made in the presence of his wife, which, respondents concede, amount to the joint declaration of both spouses, that is, the express declaration of the declarant and the implied declaration of the other spouse who acquiesced therein. (See Code Civ. Proc., sec. 1870, subd. 3; *In re Clark*, 13 Cal. App. 786 [110 Pac. 828]; *Griswold v. Frame*, 48 Cal. App. 178, 183 [191 Pac. 962].) In this connection, section 1963, subdivision 27, of the Code of Civil Procedure is pertinent. It states, as a disputable presumption, that "acquiescence followed from a belief that the thing acquiesced in was

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conformable to the right or fact". In re Clark, *supra*, deals with this precise question: "As to the third point, the acquiescence of Eliza Clark when introduced on two separate occasions as the sister of Jackson Freeman, is equivalent to an acknowledgment on her part of said relationship". Respondents attack this evidence on the ground already discussed, namely, that Flood's declarations import legitimacy, and hence could not establish knowledge of illegitimacy on the part of Mrs. Flood. In other words, their view would seem to be that Mrs. Flood must have understood by her husband's declarations that she was the mother of the child. We have already pointed out the weakness of their premise, and with that eliminated, the evidence is clearly of probative value. Second is the declaration of Mrs. Flood to Adele Cerles (Mrs. Gahan) that Flood was the father and Eudora Forde the mother of petitioner. Respondents launch a determined attack upon this testimony, pointing to alleged inconsistencies, falsehoods and prior statements and conduct of the witness, in an effort to discredit it completely and remove it from consideration as having no value at all. It would be a useless task to set forth the attempted impeachment and rehabilitation of this witness, for it is settled that the question of credibility is one for the jury, and the trial court, as already shown, cannot determine that question on a motion for directed verdict. (Estate of Lances, *supra*.) The point is clearly stated in Estate of Gird, 157 Cal. 534, 540 [108 Pac. 499, 502, 137 Am. St. Rep. 131]: "But, says counsel, there are eight separate reasons why Alice Bennett was not 'entitled to full credit', such as swearing to her own adultery, admissions and inconsistent acts. In reply we can only point to section 1847 of the Code of Civil Procedure, which, after de-

(Plaintiff's Exhibit A)

clarifying the manner in which a witness may be impeached, declares, 'and the jury are the exclusive judges of his credibility'." And in *Brandt v. Krogh*, 14 Cal. App. 39, 48 [111 Pac. 275, 279], it is said: "But no one will attempt to challenge the right of a jury or a judge, trying the facts, to believe and credit certain parts of the testimony of a witness who has been shown to have sworn falsely as to certain other material parts thereof." (See, also, *Archibald Estate v. Matteson*, 5 Cal. App. 441 [90 Pac. 723].) On this issue, likewise, the matter should have gone to the jury.

The third element of legitimation which respondents claim is lacking is the public acknowledgment of the relationship by Flood. This contention is made in spite of the numerous instances in which Flood made declarations of paternity to members of his household, friends, neighbors and complete strangers, in San Francisco, at Alma, on shipboard, in the hotel at Kobe, Japan, and to the world generally in the paper "Sayonara". It may be observed that this was not one of the grounds for the motion for directed verdict, and from a study of the court's opinion, appears not to have been a factor in its ruling. On its merits, however, the point deserves scant consideration. Basing their argument on *Estate of Baird*, 193 Cal. 225, 274-278 [223 Pac. 974], respondents asserted that there was no public acknowledgment because Flood did not acknowledge the relationship to his mother and his sister. In the cited case, *Baird*, an unmarried man, made admissions of paternity only in places where he carried on meretricious relations with the mother of the child, and not to the members of his own family (his mother, sister, brother and half-brothers), with whom

(Plaintiff's Exhibit A)

he was in constant contact. The court said (p. 278): "Under the terms of section 230 and such cases as *Estate of Jessup*, supra, [81 Cal. 408 (6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028)], and *Blythe v. Ayres*, supra, it must be held that wilful concealment of the fact of paternity by the father from relatives with whom he is in frequent intercourse and is on terms of affection is opposed to public acknowledgment of paternity." The *Baird* case certainly has no application to the facts disclosed by the record herein. Flood, a married man, maintained a family, consisting of his wife and petitioner, and to this family and to persons who visited and associated with it, he declared the relationship. On the other hand, there is no evidence in the record that Flood's mother or sister visited his home during that period, or that he maintained any close contact with them. The evidence of public acknowledgment falls well within the rules laid down in *Estate of Baird*, supra, and other cases decided by this court. (See *Estate of Gird*, supra; *Estate of Jones*, 166 Cal. 112 [135 Pac. 288]; *Estate of Jessup*, 81 Cal. 408 [21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594].)

From the foregoing brief review, we have concluded that there was competent evidence of sufficient substantiality, in support of the elements of legitimation, to necessitate the submission of the case to the jury. We have, in the course of this review, dealt with those contentions of respondents which bear directly upon the admissibility and probative value of petitioner's evidence. The remaining points of respondents represent an attempt to destroy petitioner's case by argument based on conflicting evidence, and on the absence of direct evidence on

(Plaintiff's Exhibit A)

certain matters. Parenthetically, it may be said that the principal witnesses for respondents (Eudora Forde Willette, Alfredeta Forde, Walter Fritz and Mrs. Maud Flood) were contradicted in the essential portions of their testimony by evidence of prior inconsistent statements and other contrary evidence, which fact disposes of respondents' contention that the material parts of their case should be considered on this appeal because they are undisputed and not in conflict with petitioner's case. It would greatly and unnecessarily prolong this opinion to give any extended consideration to the lengthy arguments of respondents on these points, but some may be mentioned by way of illustration. Thus, it is said that petitioner offered no direct evidence that Flood ever knew her mother at any time during his life; that she offered no evidence to show that Flood was at any place which would make it possible for him to be her father; that she offered no evidence to show the circumstances under which she was brought to Flood's home, etc. The mere statement of these propositions discloses their weakness, for it is obvious that there is no requirement that petitioner produce direct evidence upon any of these points. From the declarations and conduct discussed above, all of the elements of paternity and legitimation can be inferred, and whether the inference should be made is a question for the jury. With respect to the impossibility of Flood being the father of petitioner, counsel lean heavily upon the testimony of Mrs. Maud Flood and Walter Fritz, to the effect that Flood had been in the east and did not return to California in time to be present at the date of probable conception. An examination of the record shows that the discrepancy, based upon the normal period of gestation (280 days), was not more than

(Plaintiff's Exhibit A)

ten or fifteen days, and that these witnesses were uncertain in their recollection of the dates, basing their statements partly upon memory and partly upon Flood's habits of travel. The result of their testimony in any event was merely another conflict.

We now come to a consideration of the other evidence offered by petitioner and excluded by the court. In view of our conclusion already expressed that sufficient evidence was produced and admitted to require submission of the case to the jury, the admissibility of this remaining evidence is only important in the event that this case is tried anew. This evidence consisted of declarations of relatives of Mrs. Flood, namely, Mrs. Nancy Fritz, her mother, Beaumont Fritz, her brother, and Wilhelmina Fritz, her sister, all of whom were either dead or outside the state at the time of this trial. A written offer of proof was made by petitioner, and it was stipulated that a number of witnesses would testify that these parties had all declared upon various occasions that Constance was the daughter of James Flood, but not of Rose Flood, and that the mother of petitioner was a woman named Stearn; and that Petitioner's parentage was a frequent subject of discussion in the Fritz family. A similar offer was made as to the declarations of Walter Fritz made in the presence of other members of the family. To these offers of proof respondents objected, and the court ruled that the testimony was inadmissible. This ruling, in our opinion, was erroneous. The theory of respondents is that pedigree declarations of Flood were admissible as to the relationship of petitioner to him; and that declarations of his blood relations, or of his wife were likewise admissible; but that declarations of his

(Plaintiff's Exhibit A)

wife's relatives were incompetent. *Blackburn v. Crawford*, 70 U. S. (3 Wall.) 175 [18 L. Ed. 186], is cited to the point, and it does apparently support this narrow rule; and there is language also in *Shrewsbury Peerage Case*, 7 H. L. D. 1, 11 Eng. Rep. 1, to the same effect. There is no unanimity in the authorities, however, and the view of those cases is not a necessary conclusion from our statute. Section 1870, subdivision 4, makes the pedigree declaration admissible where the deceased declarant was related "by blood or marriage" to the person with whom the declaration deals; and section 1852 makes admissible the declaration of a "member of the family" as evidence of "common reputation" in pedigree cases. There are two theories to justify the admission of these declarations under such statutory provisions. One is that the blood relatives of Mrs. Flood were related to and were members of the family of Mr. Flood, connected by marriage instead of by blood; and that the declarations of such relatives as to his family history were admissible. The other is that petitioner who lived for a time in the household of Mrs. Fritz, was a member of her family in the broad sense of that term, and the declarations of other members of that family as to petitioner's family history were admissible, as evidence of common reputation in that family. (See *Estate of Heaton*, 135 Cal. 388 [67 Pac. 321]; *Alston v. Alston*, 114 Iowa, 29 [86 N. W. 55].) We are disposed to give a liberal interpretation to our statutes, and there is authority to support the view which we take. In *People v. Fulton Fire Ins. Co.*, 25 Wend. (N. Y.) 205, the court states that "it is the common practice to receive evidence of the declarations of persons connected with the family by marriage as well as those who were connected with it by . . .

(Plaintiff's Exhibit A)

consanguinity". In *Alston v. Alston*, supra [86 N. W. 55, 57], the court admitted declarations of parties not actually related to the alleged father, saying: "With reference to the declarations of Mr. and Mrs. De France, they do not come strictly within the rule requiring such declarations to be by a relative by blood or marriage, but it was their family in which plaintiff was brought up and we hold that their declarations are admissible by reason of such relationship." In *Estate of Williams*, 128 Cal. 552, 555 [61 Pac. 670, 672, 79 Am. St. Rep. 67], this court said: ". . . the declarations of William Frederick Williams, deceased, as to the family understanding and belief, to the effect that he (George Williams) enlisted in the army, when a boy, . . . and was believed to have been killed, and that he never married, was competent evidence and sufficient to sustain the finding of the court." Professor Wigmore, whose authoritative treatise on evidence is frequently cited by the courts of this state, condemns the doctrine of *Blackburn v. Crawford*, supra, and in criticising the distinction drawn by such cases, between relationship by blood and relationship by marriage, states: "All that can be said for such a distinction is that relations by marriage are likely to be less intimate in the family circle and to have little or no interest depending upon a chance of inheritance. But the general likelihood of their being correctly informed is perhaps quite as great as for distant consanguineous relations, and is sufficient in the ordinary instances . . . Furthermore, in general, the declaration of any person connected on one side of a marriage concerning relationship in the family on the other side would probably be received, unless the actual absence of adequate information should be made to appear in a

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given instance." (3 Wigmore, Evidence (2d ed., p. 226.) In 1 Greenleaf on Evidence, sixteenth edition, section 114c, page 198, it is said that "the declarations of any person connected by marriage only would probably be received, if he appeared to have had opportunities of information". And in 3 Jones, Commentaries on Evidence, second edition, section 1132, page 2081, a similar statement is made: "The declarations of persons connected by marriage are received, since they are more likely to be informed of the family of which they have become members than a relative who is only distantly connected by blood." It may be added that the facts of the instant cases are extraordinarily appropriate for the application of this rule, since it appears without contradiction that the members of the Flood and Fritz families were very intimately associated, that Mrs. Fritz and her children made lengthy visits at the Flood home, and that Flood made similar visits to the Fritz home at Kansas City.

The possibility of a new trial makes it necessary also to pass upon a ruling of the court which petitioner assigns as error, limiting cross-examination of one of respondents' witnesses. The witness, Mrs. Bertha Welfare, sister-in-law of Senator Bulla, testified on direct examination that she knew petitioner prior to her marriage only under the name of "Constance May Stearn" and that all the expenses of maintaining petitioner after she left the convent were met by Senator Bulla and the witness. Petitioner sought to cross-examine the witness to show first, that Flood had paid for the maintenance of petitioner, and second, that the witness knew petitioner as "Constance May Flood". She was asked, among other questions, the following: "Did you ever

(Plaintiff's Exhibit A)

know Constance by any other name, or did you ever hear any other name mentioned?" "Isn't it a fact, Mrs. Welfare, that in 1920, before Constance was married to Mr. Gavin, that Mr. Gavin, in asking you about Constance's parentage in your home, there being no other person present, said to you, 'Do you know anything about Constance's parentage?' to which you replied, 'Flood—James L. Flood, is her father; I don't know who her mother was . . .'" The court sustained objections to all of this line of questioning, stating that the questions would be permitted only if counsel for petitioner would call Mrs. Welfare as their witness. We are at a loss to understand how this obviously proper impeachment could be restricted in this manner, and in view of the wide latitude habitually permitted by our courts in cross-examination (see *Jackson v. Feather River Water Co.*, 14 Cal. 18, 23), and the willingness of the court below to admit the evidence if the witness were recalled by petitioner, the ruling must be deemed erroneous.

The judgment is reversed.

Curtis, J., Waste, C. J., Thompson, J., Seawell, J., Shenk, J., Preston, J., concurred.

Supreme Court of California

CERTIFICATE

In the Matter of the Estate of James L. Flood, Deceased.

Petition of Constance May Gavin for Partial Distribution.

Constance May Gavin, Appellant, v. The Protestant Episcopal Bishop of California (a corporation Sole), et al., Respondents. S. F. No. 14581

(Plaintiff's Exhibit A)

I, A. V. Haskell, Clerk of the Supreme Court, State of California, do hereby certify that the preceding and annexed is a true and correct copy of the opinion in the above entitled appeal, as shown by the records of my office.

Witness my hand and the seal of the Court this 14th day of June, A. D. 1945.

(Seal)

A. V. HASKELL

Clerk of the Supreme Court of the
State of California.

I hereby certify that the foregoing certificate of the Clerk of the Supreme Court of the State of California is in due form and that the signature attached thereto is the true signature of the Clerk of said Court.

PHIL S. GIBSON

Chief Justice of California.

I, A. V. Haskell, Clerk of the Supreme Court of the State of California, hereby certify that Phil S. Gibson is upon the date hereof the Chief Justice of California and that the signature to the above certificate is the true signature of said Phil S. Gibson.

Witness the seal of said Court at San Francisco, California, this 14th day of June, A. D. 1945.

(Seal)

A. V. HASKELL

Clerk of the Supreme Court of the
State of California.

[Endorsed]: No. 4139-BH. Gavin vs. USA. Plfs. Exhibit A. Filed Jul. 31, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT B]

This Agreement made by Constance May Gavin, wife of John P. Gavin, the first party, with Maud Lee Flood, as Trustee under the Trusts created by paragraph "Third" of the Will of James L. Flood, deceased, on file and of record in the office of the Clerk of the Superior Court for San Mateo County, California, and Maud Lee Flood, individually, Mary Emma Flood Stebbins, wife of Theodore E. Stebbins, and James Flood, second parties,

WITNESSETH:

1. James L. Flood, the decedent above named, died testate in the County of San Mateo, State of California, on February 15, 1926;

2. By an order of the Superior Court of the State of California, in and for the County of San Mateo, duly made and entered on March 11, 1926, (a) the last will of said decedent, duly executed by him on November 16, 1920, was admitted to probate as the last will of said decedent, (b) James E. Walsh and Maud Lee Flood named in said will as executors thereof, were duly appointed executors thereof, and (c) letters testamentary ordered issued to them.

Said letters testamentary were duly issued to said executors on the last mentioned date, and continuously thereafter until April 15, 1932 (upon which date said James E. Walsh died) they continued to be the duly appointed, qualified and acting executors of said will of said decedent; and continuously since the death of said James E. Walsh on April 15, 1932, as aforesaid, said Maud Lee Flood has been and now is the duly appointed, qualified and acting sole executor of said will of said decedent;

(Plaintiff's Exhibit B)

3. A true copy of the will of said decedent, James L. Flood, so admitted to probate, is attached hereto, marked Exhibit A, and made a part hereof;

4. Said James L. Flood left him surviving his widow, Maud Lee Flood, and two children and no others, namely, a son, James Flood, and a daughter, Mary Emma Flood (now Stebbins). Said James L. Flood left no descendants him surviving except his said son and his said daughter. Said James L. Flood did not leave him surviving any other child by blood, adoption or otherwise, but left as his only heirs at law his said widow, Maud Lee Flood and his said two children above named, his daughter, Mary Emma Flood (now Stebbins) and his son, James Flood;

5. Said Mary Emma Flood Stebbins and Theodore E. Stebbins, intermarried in the City of New York on October 18, 1930, and they ever since have been and now are husband and wife. One child, and no more, has been born to them, James Flood Stebbins, whose birth took place on the 26th day of July, 1931. There is no descendant of the said James L. Flood now living except the said Mary Emma Flood Stebbins, the said James Flood, and the said James Flood Stebbins;

6. At the time of his death the said James L. Flood was owner of 39,795 shares of the capital stock of the Flood Realty Company, a corporation. By Paragraph "Third" of his will (as will be seen by reference to Exhibit A attached hereto) said James L. Flood gave and bequeathed all shares of the capital stock of said Flood Realty Company, a corporation, which he owned at the time of his death, in trust for the purposes set out in said Paragraph "Third";

(Plaintiff's Exhibit B)

7. The estate of said James L. Flood is still in course of administration in the Superior Court for San Mateo County, California;

8. On March 15, 1927, the first party, Constance May Gavin, filed in the said Superior Court for San Mateo County an application and/or petition for partial distribution to her of a portion of said estate, claiming to be the illegitimate daughter of James L. Flood, and a pretermitted heir at law, and as such entitled to two-ninths of his estate. Said proceeding continued pending in the Superior Court for the County of San Mateo until the 7th day of August, 1931, on which day a judgment was entered that she was not the daughter of James L. Flood, whereupon an appeal was taken to the Supreme Court of California, which on the 18th day of April, 1933, reversed said Judgment and ordered the cause remanded to the Superior Court for San Mateo County for a new trial. A remittitur from said Supreme Court following said judgment was filed in the Superior Court of San Mateo County on the 20th day of May, 1933;

Since said last named day the said application and/or petition of the first party, Constance May Gavin, for partial distribution has continued and is now pending in the Superior Court for San Mateo County.

Said application and/or petition of the first party, Constance May Gavin, is at issue upon the issues raised by (a) her Second Amended Petition for Partial Distribution filed herein May 25, 1931; and (b) the Answer thereto filed herein May 25, 1931, by the following legatees and devisees under the will of said decedent, James L. Flood, and the following beneficiaries of legacies and devises in trust created in and by said will, to wit: (a) The Roman

(Plaintiff's Exhibit B)

Catholic Archbishop of San Francisco, a corporation sole; (b) The Protestant Episcopal Bishop of California, a corporation sole; (c) the St. Vincent's Roman Catholic Orphan Asylum of San Francisco for boys, a corporation; (d) San Francisco Protestant Orphanage Society, a corporation; (e) Roman Catholic Orphan Asylum of San Francisco, a corporation; (f) Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation; (g) Pacific Hebrew Orphan Asylum and Home Society, a corporation; (h) Maud Lee Flood and James E. Walsh, as trustees of the trusts set forth in Paragraph Third of the will of the above named decedent; (i) Maud Lee Flood and James E. Walsh, as Trustees of the trusts set forth in Paragraph Fifth of the will of said decedent; (j) Maud Lee Flood; (k) Mary Emma Stebbins, formerly Mary Emma Flood, who on October 18, 1930 became and now is the wife of Theodore Ellis Stebbins; (l) James Flood; (m) The Regents of the University of California, a corporation; and (n) James E. Walsh, as Executor of the Will of Cora Jane Flood, deceased. (Those by whom said Answer was filed are or may be hereinafter for convenience sometimes called the respondents.)

9. None of the parties of the second part, nor any of the beneficiaries of the trust created by Paragraph Third of the Will of said decedent, nor any of the legatees or devisees named in or taking under the will of said deceased, nor any of the respondents named above, recognizes or has ever recognized the validity of the claim thus put forward by the first party, and all of them have heretofore continuously denied and now deny that she is the daughter of the said James L. Flood, deceased.

(Plaintiff's Exhibit B)

10. Nevertheless the second parties do not desire to carry on the litigation and have arranged a compromise thereof with the first party whereunder the second parties will transfer, assign and set over to the said first party and her transferees and assigns certain interests to which the second parties are entitled under the will of said deceased as follows:

- (a) The said Maud Lee Flood, as trustee of the trusts created by Paragraph Third of the will, is to set over and transfer to the said first party, and/or her assigns, 5896 shares of the capital stock of the Flood Realty Company, a corporation organized under the laws of the State of California.
- (b) Said Maud Lee Flood, Mary Emma Flood Stebins, and James Flood, are to set over and assign to said first party, and/or her assigns,
- (1) The following shares of stock in corporations organized under the laws of the State of California:
 - 37 shares of the preferred stock, \$50. par, of California Pacific Title and Trust Company, a corporation;
 - 57 shares of the common stock of California Pacific Title and Trust Company, a corporation;
 - 4 shares of the capital stock of Merchants Exchange, Inc., a corporation;
 - 8 shares of Morris Plan Company of San Francisco, a corporation;
 - 607 shares of the first preferred stock of Pacific Gas and Electric Company, a corporation, of \$25. Par;

(Plaintiff's Exhibit B)

111 shares of the San Francisco Remedial Loan Association, a corporation.

- (2) An undivided interest in the real property owned by the decedent in Mendocino and Marin Counties, as shown by the description thereof in the Inventory and Appraisement, less portions and/or interests in Marin County which have been sold and disposed of during administration.
- (3) Cash: An undivided 4/27ths of any unexpended balance which may be received by them from the estate, after all charges and expenses have been paid, which 4/27ths is estimated to amount to between \$5,000. and \$7,500.

In addition, the following legatees have abated a portion of the legacies given to them in the will (and interest), and as a result of said abatement \$20,000. is to be paid to said first party which comes from:

- (a) The Roman Catholic Archbishop of San Francisco, a corporation sole;
- (b) The Protestant Episcopal Bishop of California, a corporation sole;
- (c) The St. Vincent's Roman Catholic Orphan Asylum of San Francisco for boys, a corporation;
- (d) San Francisco Protestant Orphanage Society, a corporation;
- (e) Roman Catholic Orphan Asylum of San Francisco, a corporation;
- (f) Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation, and
- (g) Pacific Hebrew Orphan Asylum and Home Society, a corporation.

(Plaintiff's Exhibit B)

In addition to the foregoing, said Maud Lee Flood, Mary Emma Flood Stebbins, and James Flood are to pay to said first party and/or her assigns, the sum of \$100,000. out of their own funds and not distributable out of the estate of said deceased, and are to make and agreement contemporaneously with the delivery by the first party of this agreement in respect of property belonging to the said estate not now known or discovered but which may later become known or discovered.

Now, Therefore, the first party, in consideration of the premises and of the payments and transfers aforesaid, does hereby

(1) Acknowledge receipt of the payments of the aforesaid sums of money and transfer to her, and/or her assigns, of the property above listed; and the writing dealing with property belonging to the estate not now known or discovered, which is mentioned above.

(2) Promise, covenant and agree with the said second parties, and each of them, their devisees, legatees, successors in interest in estate and assigns, that she, the first party, Constance May Gavin, will never hereafter assert that she is the daughter of James L. Flood, nor claim any right, title or interest in or to his estate, or any part thereof, as an heir at law or child of said James L. Flood, nor ever assert any right, title or interest in any property derived by the second parties, or any of them, their successors, heirs, legatees or assigns, by, through or under the will of James L. Flood, deceased,

(Plaintiff's Exhibit B)

except such property as she has received or may receive by transfer from the second parties as hereinabove stated, (or under the above mentioned agreement relating to property belonging to the said estate not now known or discovered) whether said property consists of the identical property derived by said second parties, or any of them, from the estate of said James L. Flood, deceased, or from rents, issues or profits thereof, or by the sale of any part of the same, and/or the reinvestment of the proceeds of such sale.

(3) Further covenant that she, the first party, Constance May Gavin, will not at any time assert or claim any relationship whatever to the second parties, or any of them, or make any claim against any person whomsoever, whether such person be one of the parties of the second part or the descendants of any of them, or otherwise related to them, (and whether such persons be now or later born) by reason of or based upon the claim or an assertion that she, the first party, Constance May Gavin, was the daughter of James L. Flood, or that she had any right of inheritance in the estates of any of the second parties, or of any other person or persons whomsoever now living or hereafter to be born upon the grown or predicated upon the assertion that she is or was the daughter of James L. Flood.

(4) Agree for herself and for her heirs, successors in interest, and assigns, to warrant and defend the title of the property of the second parties, their heirs, devisees, legatees, successors and assigns against all claim to said property or any thereof, or any part or parcel thereof, to be made by her, or by any person claiming under her,

(Plaintiff's Exhibit B)

and the first party agrees on her own behalf and on behalf of her heirs, successors in interest, legatees and *and* devises, that neither she nor any of them, shall or will in any manner, or to any extent, set up or claim any right to participate or take part in the administration of the estate or estates of any person or persons whomsoever now or hereafter born based upon the claim or assertion that she is or was the daughter of James L. Flood.

In Witness Whereof, the first party has hereunto set her hand at the City and County of San Francisco, State of California, this 28th day of February, 1934.

CONSTANCE MAY GAVIN.

State of California, County of San Mateo—ss.

I, T. C. Rice, County Recorder in and for the County of San Mateo, State of California, do hereby certify the annexed to be a full, true and correct excerpt copied from the record of Agreement made by Constance May Gavin to Maud Lee Flood, as Trustee as the same appears of record in Vol. 619 of Official Records at page 104, records of said county.

In Witness Whereof, I have hereunto set my hand and seal of office, this 28th day of July, A. D. 1945.

(Seal)

T. C. RICE

County Recorder

Deputy Recorder

[Endorsed]: No. 4139-BH. Gavin vs. USA. Plfs. Exhibit B. Filed Jul. 31, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT C]

Minute Book 61 Page 13

In the Superior Court of the State of California, in and
for the County of San Mateo.

February 28, 1934

Present, Hon. William F. James, Judge.

In the Matter of the Estate of James L. Flood, Deceased. No. 3829.

The trial and hearing on the petition for partial distribution of the estate of the above named deceased and hearing on the settlement of the second, third, fourth and final account _and petition for final distribution of said estate came regularly on this day, Garret W. McEnerney, Esq., Theo J. Roche, Esq., Andrew F. Burke, Esq., Messrs. Barrett & Calkins, Messrs. Ross & Ross and Messrs. Murphy, Zook, Slack and Oliver Dibble, Esq., appearing for the executor and certain heirs and devisees, and John J. Taaffe, Esq., and Albert Mansfield, Esq., appearing for Constance May Gavin. W. H. Girvin, Court Reporter, present.

Theo J. Roche, Esq., made his statement to the court on behalf of the respondents on the petition of Constance May Gavin for partial distribution of the estate of the above named deceased and documentary evidence was introduced and marked Respondents' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and the evidence being closed, said matter was submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein,

(Plaintiff's Exhibit C)

It is ordered that the petition of Constance May Gavin for partial distribution of said estate be and the same is hereby denied.

Darrell W. Daly was called, sworn and examined as a witness on the part of the executor and documentary evidence was introduced, and the evidence being closed, said matter was submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein,

It is ordered that the second, third, and fourth and final accounts of executor be and the same are hereby settled and allowed as presented and final distribution of estate is hereby made as prayed for.

State of California, County of San Mateo—ss.

I, W. H. Augustus, County Clerk of the above entitled County, and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the original on file in my office, and that I have carefully compared the same with the original.

Witness my hand and seal of said Superior Court this 18th day of July, 1945.

(Seal)

W. H. AUGUSTUS

County Clerk and Ex-Officio Clerk, Superior Court

By June M. Lynch

Deputy Clerk

(Plaintiff's Exhibit C)

In the Superior Court of the State of California, in and
For the County of San Mateo

In the Matter of the Estate of James L. Flood, Deceased.

Petition of Constance May Gavin for Partial Distribution, Filed March 15, 1927; superseded by her Amended Petition for Partial Distribution filed December 7, 1927, and the latter superseded by her Second Amended Petition for Partial Distribution filed May 25, 1931. No. 3829, Probate

DECISION: FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

The above mentioned petition of Contance May Gavin for partial distribution (hereinafter for convenience sometimes called the petitioner) in the above entitled estate came on this day to be tried upon the issues raised by (a) her Second Amended Petition for Partial Distribution filed herein May 25, 1931; and (b) the Answer thereto filed herein May 25, 1931, by the following legatees and devisees under the will of the above named decedent named therein and the following beneficiaries of legacies and devises in trust created in and by said will, to-wit: (a) The Roman Catholic Archbishop of San Francisco, a corporation sole; (b) The Protestant Episcopal Bishop of California, a corporation sole; (c) The St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation; (d) San Francisco Protestant Orphanage Society, a corporation; (e) Roman Catholic Orphan Asylum of San Francisco, a corporation; (f) Maria Kip Orphanage and Al-Fred Nuttall Nelson Memorial Home, a corporation; (g) Pacific Hebrew Orphan Asy-

(Plaintiff's Exhibit C)

lum and Home Society, a corporation; (h) Maud Lee Flood and James E. Walsh, as Trustees of the trusts set forth in Paragraph Third of the will of the above named decedent on file herein; (i) Maud Lee Flood and James E. Walsh, as Trustees of the trusts set forth in Paragraph Fifth of the will of said decedent on file herein; (j) Maud Lee Flood; (k) Mary Emma Stebbins, formerly Mary Emma Flood, who on October 18, 1930 became and now is the wife of Theodore Ellis Stebbins; (l) James Flood; (m) The Regents of the University of California, a corporation; and (n) James E. Walsh, as Executor of the will of Cora Jane Flood, deceased. (Those by whom said Answer was filed are hereinafter for convenience sometimes called the respondents.)

Evidence was offered and received in respect of and relevant to the issues created by said second amended petition and the answer thereto, and thereupon the said second amended petition for partial distribution was submitted to the court for decision.

The court now renders and files its decision herein and finds the facts to be as follows:

FINDINGS OF FACT.

(1) The petitioner, Constance May Gavin, was born at 626 Eddy Street in San Francisco on May 11, 1893; Eudora Helen Forde Willette (then Ford or Forde) is her mother; James L. Flood was not and is not the father of said petitioner, Constance May Gavin; said Eudora Helen Forde Willette (then Ford or Forde) was not married on May 11, 1893 nor theretofore, and that the petitioner, Constance May Gavin, was illegitimate born. Said petitioner was baptized at 626 Eddy Street,

(Plaintiff's Exhibit C)

San Francisco, on May 19, 1893, by Edward J. Doran, a Priest of the Roman Catholic Church, at that time an Assistant Rector at St. Mary's Cathedral, Van Ness Avenue and O'Farrell Street, San Francisco.

The Record of said baptism reads as follows:

“Record of Baptism.

St. Marys Cathedral

May 19th 1893

Constans Marguerite Stern

Born 11th May 1893

(Victor Stern

Par. (

(Eudora Ford

Privatim

Matrina Alfredita Ford

Edward J. Doran

Asst.”

The meanings of the words in said Record of Baptism, “Par.”; “Matrina”, “Privatim”, are as follows:

Par.—Parentes—Parents;

Matrina—Godmother;

Privatim—Private—Not at Church.

Alfredita Ford, named as the god mother of petitioner in the foregoing Record of Baptism, is the mother of Eudora Helen Forde Willette (then Ford or Forde). Said Alfredita Ford and said Eudora Helen Forde (or Ford) Willette are still living, and they now reside at 535-41st Street, Oakland, California.

(2) James L. Flood and Maud Lee Fritz intermarried at Kansas City, Missouri, on February 8, 1899, and they

(Plaintiff's Exhibit C)

ever thereafter remained husband and wife until the death of said James L. Flood, which occurred February 15, 1926; Mary Emma Flood was born of said marriage at San Francisco July 7, 1900, and is a legatee and devisee under the will of her said father; on October 18th, 1930 said Mary Emma Flood intermarried with Theodore Ellis Stebbins, and has ever since been, and now is, his wife; James Flood was born of said marriage of James L. Flood and Maud Lee Fritz, at San Francisco, July 13, 1908, and is a legatee and devisee in and under the will of his said father; Cora Jane Flood, sister of the decedent James L. Flood, died November 1, 1928, and by Decree of Final Distribution in her estate entered in the Superior Court of San Mateo County, California, on June 19, 1930 her entire estate was distributed to her niece, Mary Emma Flood Stebbins, and her nephew, James Flood; James E. Walsh became on November 30, 1928 the duly qualified and acting executor of the will of said Cora Jane Flood, deceased, and continued to act as such, never having been discharged, down to the date of his death, which occurred April 15, 1932.

One child, a son, named James Flood Stebbins, has been born of the marriage of said Theodore Ellis Stebbins and Mary Emma Flood as aforesaid, and no other child. Said James Flood Stebbins was born July 26, 1931.

Said James Flood, son of James L. Flood, never has been married.

The only living descendants of said James L. Flood are his daughter, the said Mary Emma Flood Stebbins, his son, the said James Flood, and his grandson, the said James Flood Stebbins, born of the marriage of Theodore Ellis Stebbins and Mary Emma Flood, as aforesaid.

(Plaintiff's Exhibit C)

CONCLUSIONS OF LAW.

And as its Conclusions of Law from the foregoing facts, the court adjudges that respondents (except James E. Walsh, who died April 15, 1932) are entitled to a judgment herein (a) that petitioner, Constance May Gavin is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood; (b) that petitioner did not succeed to any part or portion of his estate; (c) that the petitioner take nothing by her said Second Amended Petition nor her application for partial distribution; and (d) that the said respondents (other than James E. Walsh, who died April 15, 1932) have a judgment against the petitioner Constance May Gavin for their costs herein incurred taxed at \$1.00.

Let Judgment be entered accordingly.

Dated: February 28th, 1934.

WM. F. JAMES

Judge of the Superior Court.

State of California, County of San Mateo—ss.

I, W. H. Augustus, County Clerk of the above entitled County, and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the original on file in my office, and that I have carefully compared the same with the original.

Witness my hand and seal of said Superior Court this 18th day of July, 1945.

(Seal)

W. H. AUGUSTUS

County Clerk and Ex-Officio Clerk, Superior Court

By June M. Lynch

Deputy Clerk

[Endorsed]: Filed Feb. 28, 1934. E. B. Hinman,
Clerk, by H. A. Hargrave, Deputy Clerk.

(Plaintiff's Exhibit C)

In the Superior Court of the State of California, in and
for the County of San Mateo.

In the Matter of the Estate of James L. Flood, Deceased.

Petition of Constance May Gavin for Partial Distribution, Filed March 15, 1927; superseded by her Amended Petition for Partial Distribution filed December 7, 1927, and the latter superseded by her Second Amended Petition for Partial Distribution filed May 25, 1931. No. 3829, Probate

JUDGMENT

The above mentioned petition of Constance May Gavin for partial distribution (hereinafter for convenience sometimes called the petitioner) in the above entitled estate came on this day to be tried upon the issues raised by (a) her Second Amended Petition for Partial Distribution filed herein May 25, 1931; and (b) the Answer thereto filed herein May 25, 1931, by the following legatees and devisees under the will of the above named decedent named therein and the following beneficiaries of legacies and devises in trust created in and by said will, to wit: (a) The Roman Catholic Archbishop of San Francisco, a corporation sole; (b) The Protestant Episcopal Bishop of California, a corporation sole; (c) The St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation; (d) San Francisco Protestant Orphanage Society, a corporation; (e) Roman Catholic Orphan Asylum of San Francisco, a corporation; (f) Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation; (g) Pacific Hebrew Orphan Asylum and Home Society, a corporation; (h)

(Plaintiff's Exhibit C)

Maud Lee Flood and James E. Walsh as Trustees of the trusts set forth in Paragraph Third of the will of the above named decedent on file herein; (i) Maud Lee Flood and James E. Walsh, as Trustees of the trusts set forth in Paragraph Fifth of the will of said decedent on file herein; (j) Maud Lee Flood; (k) Mary Emma Stebfins, formerly Mary Emma Flood, who on October 18, 1930 became and now is the wife of Theodore Ellis Stebbins; (l) James Flood; (m) The Regents of the University of California, a corporation; and (n) James E. Walsh, as Executor of the will of Cora Jane Flood, deceased. (Those by whom said Answer was filed are hereinafter for convenience sometimes called the respondents.)

Thereupon the court tried said proceeding and the same was submitted to the court for decision, after which the court rendered and filed its decision in writing herein, pursuant whereto

It Is Hereby Ordered, Adjudged and Decreed as follows:

(1) Petitioner, Contance May Gavin, is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood;

(2) Petitioner, Constance May Gavin, did not succeed to any part or portion of the estate of James L. Flood, deceased.

(3) Petitioner, Constance May Gavin, take nothing by her Second Amended Petition nor by her application for partial distribution.

(4) Respondents (other than James E. Walsh, who died April 15, 1932) have a judgment against petitioner,

(Plaintiff's Exhibit C)

Constance May Gavin, for their costs herein incurred taxed at \$1.00.

Let this Judgment be entered accordingly.

Dated: February 28th, 1934.

(Signed) WM. F. JAMES

Judge of the Superior Court.

[Endorsed]: Filed 2/28/34. E. B. Hinman, Clerk.

[Endorsed]: No. 4139-BH. Gavin vs. USA. Plfs. Exhibit C. Filed Jul. 31, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT D]

In the Superior Court of the State of California in and
for the County of San Mateo

In the Matter of the Estate of James L. Flood, Deceased. No. 3829, Probate

DECREE OF FINAL DISTRIBUTION

Maud Lee Flood as Executor of the Will of James L. Flood, deceased (her co-executor, James E. Walsh, having died on April 15, 1932) having heretofore, to wit, on December 22, 1933, filed herein her Second Account, and having thereafter and on December 28, 1933 filed herein her Third Account, and having thereafter and on February 8, 1934, filed herein her Fourth and Final Account and Report of her administration of the estate of said deceased, with a Petition for the allowance and settlement of said Second Account and said Third Account and said Fourth and Final Account, and a petition for the Final

(Plaintiff's Exhibit D)

Distribution of said estate, and said executor having on the date of this decree filed herein her Supplemental Final Account; and said Second Account and said Third Account and said Fourth and Final Account and Report and said petition for the settlement and allowance of

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[Seal Superior Court, County of San Mateo, California]

Garret W. McEnerney,
Attorney for Executor,
2002 Hobart Bldg.,
San Francisco, California

said accounts and said Supplemental Final Account having come on regularly to be heard by the Court on the date of this decree and having been duly and regularly heard, and the Court having made and filed herein its decree settling said Second Account and said Third Account and said Fourth and Final Account and the said Supplemental Final Account, and the Court having thereupon proceeded to hear and having heard said petition for the final distribution of said estate, and it appearing to the Court and the Court hereby finds that the estate of said deceased is in a condition to be closed and that final distribution may be had herein, and it furthermore appearing to the satisfaction of the Court that notice of the hearing of said petition for the final distribution of said estate had been duly and regularly given to all persons interested in the estate of said decedent and to all persons who had requested notice and/or who had given notice of appearance in said estate in person or by attorney for the time and in the manner prescribed by law, and the Court having heard the evidence upon said appli-

(Plaintiff's Exhibit D)

cation for final distribution, both oral and documentary, and being fully advised in the premises, does hereby find, adjudge and decree that:

1. James L. Flood, the decedent above named, died testate in the County of San Mateo, State of California, on February 15th, 1926;

2. By an order of this Court duly made and entered on March 11, 1926, (a) the last Will of said decedent, duly executed by him on November 16, 1920, was admitted to probate as the last Will of said decedent, (b) James E. Walsh and Maud Lee Flood named in said Will as Executors thereof, were duly appointed executors thereof, and (c) Letters Testamentary ordered issued to them;

Said Letters Testamentary were duly issued to said Executors on the last mentioned date, and continuously thereafter until April 15, 1932 (upon which date said James E. Walsh died) they continued

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[Seal Superior Court, County of San Mateo, California]

to be the duly appointed, qualified and acting executors of said Will of said decedent; and continuously since the death of said James E. Walsh on April 15, 1932, as aforesaid, said Maud Lee Flood has been and now is the duly appointed, qualified and acting sole executor of said Will of said decedent;

(3) Said Will of said decedent James L. Flood, on file with the Clerk of this Court and the recordation thereof in the Minutes of the Court are hereby referred to and made a part hereof;

(Plaintiff's Exhibit D)

(4) Said James L. Flood left him surviving his widow, Maud Lee Flood, and two children, and no others, namely, a son James Flood, and a daughter, Mary Emma Flood (now Stebbins). Said son, James Flood, was born July 13, 1908, and became of age July 13, 1929. Said daughter, Mary Emma Flood (now Stebbins) was born July 7, 1900. Said James L. Flood left no descendants him surviving except his said son and his said daughter. Said James L. Flood did not leave him surviving any other child by blood, adoption or otherwise, but left as his only heirs at law, his said widow, Maud Lee Flood and his said two children above named, his daughter, Mary Emma Flood (now Stebbins) and his son, James Flood. Said James L. Flood was over the age of sixty years at the time of his death. Said Maud Lee Flood, Mary Emma Flood (now Stebbins) and James Flood are still alive;

(5) Said Mary Emma Flood Stebbins and Theodore E. Stebbins intermarried in the City of New York on October 18, 1930, and they ever since have been and now are husband and wife. One child, and no more, has been born to them, James Flood Stebbins, whose birth took place on the 26th day of July, 1931. There is no descendant of the said James L. Flood now living except the said Mary Emma Flood Stebbins, the said James Flood, and the said James Flood Stebbins. Said Mary Emma Flood Stebbins, Theodore E. Stebbins and James Flood Stebbins are still alive;

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[Seal Superior Court, County of San Mateo, California]

(6) On March 15, 1927, Constance May Gavin filed in this Court an application and/or petition for partial distribution to her of a portion of said estate, claiming

(Plaintiff's Exhibit D)

to be the illegitimate daughter of James L. Flood, and a pretermitted heir at law, and as such entitled to 2/9th of his estate. Said proceeding continued pending in this Court until the 7th day of August, 1931 on which day a judgment was entered that she was not the daughter of James L. Flood, whereupon an appeal was taken to the Supreme Court of California, which on the 18th day of April, 1933, reversed said judgment and ordered the cause remanded to this Court for a new trial. A remittitur from said Supreme Court following said judgment was filed in this Court on the 20th day of May, 1933;

Said application and/or petition of Constance May Gavin for partial distribution continued pending in this Court from the 20th day of May, 1933, to this date, when it was tried by the Court without a jury (a jury having been waived) and resulted in the "Decision: Findings of Fact and Conclusions of Law," and also in the "Judgment" which are on file herein and are final. In and by said judgment, among other things, it is ordered, adjudged and decreed as follows:

(a) Petitioner, Constance May Gavin, is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood;

(b) Petitioner, Constance May Gavin, did not succeed to any part or portion of the estate of James L. Flood, deceased;

(c) Petitioner, Constance May Gavin, take nothing by her second amended petition or by her application for partial distribution;

(7) Paragraph "Second" of the Will of James L. Flood reads as follows:

(Plaintiff's Exhibit D)

“Second: I hereby give and bequeath to the Roman Catholic Archbishop of San Francisco, a corporation, sole, the sum of twenty thousand (\$20,000) dollars, to be divided in amounts to be fixed by it amongst the charitable institutions under its control; to the Protestant Episcopal Bishop of California, a corporation, sole, the sum of twenty thousand (\$20,000) dollars, to be divided in amounts to be fixed by it amongst the charitable institutions under its control; to the St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation, the sum of twenty five thousand (\$25,000) dollars, to San Francisco, Protestant Orphanage Society, a corporation, the sum of twenty five thousand (\$25,000) dollars; to Roman Catholic Orphan Asylum of San Francisco, a corporation, the sum of twenty five thousand (\$25,000) dollars, to Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation, the sum of five thousand (\$5,000) dollars; to Pacific Hebrew Orphan Asylum and Home Society, a corporation, the sum of five thousand (\$5,000) dollars.”

Partial payments have been made to the legatees named in paragraph “Second” and they have abated 4/27ths of the legacies given to them in said paragraph (and interest) so that payment of the sums hereinafter distributed to them will constitute final payment;

(8) In paragraph “Third” of his will, said James L. Flood bequeathed all shares of the capital stock of the Flood Realty Company, a corporation, owned by him at the time of his death, in trust for the uses and purposes as in said paragraph “Third” stated, whereunder the trustees thereof, among other things, were to collect and receive the income from the trust estate during the

(Plaintiff's Exhibit D)

life of the last survivor of the following named four persons, namely, his wife, Maud Lee Flood, his sister, Cora Jane Flood, his

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daughter Mary Emma Flood (now Stebbins) and his son James Flood. In said paragraph "Third" of his said Will, said testator further provided that the said trust should cease and terminate upon the death of the last survivor of said four named persons and that all property then belonging to the trust estate should "upon the death of the said last survivor" go and belong to the issue, if any, of his said son and/or his said daughter; and if neither his said son or his said daughter should have left issue then living, then to "the Regents of the University of California, a corporation," in trust to apply the same to the uses and purposes of the University of California;

The statement in this paragraph and in other portions of this decree respecting the provisions or effect of said Will shall be subject to the terms of the said Will, a copy of which is hereto attached, marked "Exhibit A" and made a part hereof. As elsewhere stated, said Maud Lee Flood, said Mary Emma Flood (now Stebbins) and said James Flood were alive at the death of said James L. Flood, and they are still alive. Cora Jane Flood was alive at the death of her brother James L. Flood, but later died, towit, on November 1, 1928;

(9) In paragraph "Fourth" of his Will, said James L. Flood gave and devised to his wife, Maud Lee Flood, and to his daughter, Mary Emma Flood (now Stebbins)

(Plaintiff's Exhibit D)

each a one third interest in all real property to which he died seized or possessed;

(10) In paragraph "Fifth" of his Will, said James L. Flood gave and devised an undivided one third interest in all real property of which he died seized or possessed unto Maud Lee Flood and James E. Walsh as trustees, upon the trusts and for the uses and purposes therein specified, for the benefit of his said son James Flood during the minority of said James Flood, and further provided that upon said James Flood attaining his majority, the trust

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created by said paragraph "Fifth" should cease and terminate. Said James Flood attained his majority on July 13, 1929, and hence the trust created by the provisions of said paragraph "Fifth" are no longer and can not in the future be operative. On the contrary, by virtue of the terms of paragraph "Fifth" of said Will, one third of all real property of which the decedent died seized or possessed goes directly to his said son, James Flood, inasmuch as he came of age July 13, 1929;

(11) In paragraph "Seventh" of his Will, said James L. Flood gave, devised and bequeathed the rest, residue and remainder of his estate, in equal shares, to his wife, Maud Lee Flood; his daughter, Mary Emma Flood (now Stebbins) and his son, James Flood;

(12) As will appear by the decree of settlement of Second Account and of Third Account and Fourth and Final

(Plaintiff's Exhibit D)

Account and Supplemental Final Account of Executor filed herein this day, there is on hand for distribution the sum of \$56,259.14, and the real and personal property set forth in "Schedule A" attached to said decree, to which reference is hereby made;

(13) Except for the requests for and consents to distribution to others and abatements of legacies made by them, as hereinafter stated, the only persons who would be now entitled to distribution would be the legatees and devisees under the Will of said deceased, and particularly under paragraphs Second, Third, Fourth, Fifth and Seventh thereof;

(14) All inheritance taxes due the State of California, and all personal property taxes due from or payable out of said estate have been fully paid and discharged by the executor;

(15) All claims presented against the estate of said decedent have been paid;

(16) On August 12, 1931, James E. Walsh and Maud Lee Flood

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as trustees of the trust created in paragraph "Third" of the Will of said decedent, sold 4295 shares of the capital stock of the Flood Realty Company, a corporation, to said Flood Realty Company for considerations which have been received and were adequate. Said Maud Lee Flood, as such trustee, consents that 4295 shares of the capital stock of the Flood Realty Company, a corporation, which would otherwise be distributable to her as trustee aforesaid, shall be distributed directly to said Flood Realty

(Plaintiff's Exhibit D)

Company, and requests the court to make distribution accordingly:

(17) Said Maud Lee Flood, as such trustee, consents to the distribution of 5896 shares of the capital stock of the Flood Realty Company which would otherwise be distributable to her as trustee, to the persons and in the number of shares below named, and requests the court to make distribution accordingly:

To Constance May Gavin	2,948 shares Flood Realty Company
To Carmelita Aureguy	1,474 shares Flood Realty Company
To Maxwell McNutt	700 shares Flood Realty Company
To John J. Taaffe, and Tressie G. Taaffe, his wife, as Joint Tenants	700 shares Flood Realty Company
To Albert Mansfield	74 shares Flood Realty Company

5,896

(18) Maud Lee Flood, individually, Mary Emma Flood Stebbins and James Flood, hereby consent to distribution out of property to which they would be otherwise entitled, and request the Court to make distribution as follows:

(a) To Constance May Gavin the following shares of stock in corporations organized and existing under the laws of the State of California:

(Plaintiff's Exhibit D)

1. 37 shares of the preferred stock, \$50.00 par, of California Pacific Title and Trust Company, a corporation;

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2. 57 shares of the common stock of California Pacific Title and Trust Company, a corporation;

3. 4 shares of the capital stock of Merchants Exchange, Inc., a corporation;

4. 8 shares of the Morris Plan Company of San Francisco, a corporation;

5. 607 shares of the first preferred stock of Pacific Gas and Electric Company, a corporation;

6. 111 shares of the San Francisco Remedial Loan Association, a corporation;

(b) To Constance May Gavin the sum of \$20,000.00 out of the legacies given by paragraph "Second" of the Will and the abatement made by the legatees therein named;

(c) To Constance May Gavin an undivided 2/27ths interest in all of the lands situate in the Counties of Mendocino and Marin which are set forth and described in Schedules A and B attached to this decree;

(d) To John J. Taaffe an undivided 2/27ths interest in all of the lands situate in the Counties of Mendocino and Marin which are set forth and described in Schedules A and B attached to this decree;

Now, Therefore, in consideration of the law and the premises, It Is Hereby Further Ordered, Adjudged and Decreed:

(Plaintiff's Exhibit D)

(1) That due and legal notice of the hearing of the petition for final distribution has been given;

(2) That due and legal notice of the creditors of said James L. Flood has been given; that the same is established of record, and that this decree be entered in the Minutes of this Court and recorded;

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[Seal Superior Court, County of San Mateo, California]

(3) That there be and there is hereby awarded, set over and distributed unto the following corporations named in paragraph "Second" of the Will of said deceased the following:

(a) To the Roman Catholic Archbishop of San Francisco, a corporation sole, the sum of one thousand four hundred eighty-one and $47/100$ dollars (\$1,481.47) as final payment on account of the legacy of \$20,000.00 "to be divided in amounts to be fixed by it amongst the charitable institutions under its control," given to said corporation sole in paragraph "Second" of the Will of said decedent;

(b) To the Protestant Episcopal Bishop of California, a corporation sole, the sum of one thousand four hundred eighty one and $47/100$ dollars (\$1,481.47) as final payment on account of the legacy of \$20,000.00 "to be divided in amounts to be fixed by it amongst the charitable institutions under its control," given to said corporation sole in paragraph "Second" of the Will of said decedent;

(c) To the St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation, the sum of one thousand eight hundred fifty one and $82/100$ dol-

(Plaintiff's Exhibit D)

lars (\$1,851.82) as final payment on account of the legacy of \$25,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(d) To San Francisco Protestant Orphanage Society, a corporation, the sum of one thousand eight hundred fifty one and 82/100 dollars (\$1,851.82) as final payment on account of the legacy of \$25,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(e) To the Roman Catholic Orphan Asylum of San Francisco, a corporation, the sum of one thousand eight hundred fifty one and 82/100 (\$1,851.82) dollars, as final payment on account of the legacy

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of \$25,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(f) To Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation, the sum of three hundred seventy and 37/100 dollars (\$370.37) as final payment on account of the legacy of \$5,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(g) To Pacific Hebrew Orphan Asylum and Home Society, a corporation, the sum of three hundred seventy and 37/100 dollars (\$370.37) as final payment on account of the legacy of \$5,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(4) That there be and there is hereby awarded, set over and distributed unto Constance May Gavin the sum of Twenty Thousand Dollars (\$20,000.), payable in

(Plaintiff's Exhibit D)

consequence of partial abatement of the legacies of \$125,000.00 bequeathed in paragraph "Second" of the Will of said decedent;

(5) That there be and there is hereby awarded, set over and distributed unto Constance May Gavin the following:

(a) Thirty seven (37) shares of the preferred stock, par of California Pacific Title and Trust Company, a corporation;

(b) Fifty seven (57) shares of the common stock of California Pacific Title and Trust Company, a corporation;

(c) Four (4) shares of the capital stock of Merchants Exchange, Inc., a corporation;

(d) Eight (8) shares of the Morris Plan Company of San Francisco, a corporation;

(e) Six Hundred and Seven (607) shares of the first preferred stock of Pacific Gas and Electric Company, a corporation;

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(f) One Hundred and Eleven (111) shares of the San Francisco Remedial Loan Association, a corporation;

(g) An undivided 2/27ths of the pieces and parcels of land situate in Mendocino County, California, described in "Schedule A" attached to this decree;

(h) An undivided 2/27ths of the pieces and parcels of land situate in Marin County, California, described in "Schedule B" attached to this decree;

(Plaintiff's Exhibit D)

(6) That there is hereby awarded, set over and distributed to John J. Taffe the following:

(a) An undivided 2/27ths of the pieces and parcels of land situate in Mendocino County, California, described in "Schedule A" attached to this decree;

(b) An undivided 2/27ths of the pieces and parcels of land situate in Marin County, California, described in "Schedule B" attached to this decree;

(7) That there be and there is hereby awarded, set over and distributed to Flood Realty Company, 4295 shares of Flood Realty Company as the successors in interest by purchase of the right, title and interest thereto of the trustee or trustees in paragraph "Third" of the Will of said decedent;

(8) That there be and there is hereby awarded, set over and distributed five thousand eight hundred ninety six (5,896) shares of the capital stock of the Flood Realty Company to the persons and in the amounts of shares following:

(a) To Constance May Gavin, two thousand nine hundred forty eight (2,948) shares;

(b) To Carmelita Aureguy, one thousand four hundred seventy four (1,474) shares;

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(c) To Maxwell McNutt, seven hundred (700) shares;

(d) To John J. Taffe and Tressie G. Taaffe, his wife, as Joint Tenants, seven hundred (700) shares;

(e) To Albert Mansfield seventy four (74) shares;

(9) That there be and there is hereby awarded, set over and distributed to Maud Lee Flood, as trustee of the

(Plaintiff's Exhibit D)

trusts specified in paragraph "Third" of the Will of said decedent, twenty nine thousand six hundred and four (29,604) shares of the capital stock of Flood Realty Company, a corporation;

(10) That there be and there is hereby awarded, set over and distributed to Maud Lee Flood, individually; to Mary Emma Flood Stebbins, and to James Flood, and to each of them severally, the following:

(a) Out of the preferred shares, \$50.00 par, of California Pacific Title and Trust Company, a corporation; Maud Lee Flood, seventy three (73) shares; Mary Emma Flood Stebbins, seventy one (71) shares; James Flood, seventy one (71) shares;

(b) Out of common shares of California Pacific Title and Trust Company, a corporation: Maud Lee Flood, one hundred and eleven (111) shares; Mary Emma Flood Stebbins, one hundred and eleven (111) shares; James Flood, one hundred and eleven (111) shares;

(c) Out of shares of Merchants Exchange, Inc.: Maud Lee Flood, ten (10) shares; Mary Emma Flood Stebbins, eight (8) shares; James Flood, eight (8) shares;

(d) Out of shares of the Morris Plan Company of San Francisco, a corporation: Maud Lee Flood, eighteen (18) shares; Mary Emma Flood Stebbins, seventeen (17) shares; James Flood, seventeen (17) shares;

(e) Out of the first preferred shares of Pacific Gas and Electric

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Company, a corporation: Maud Lee Flood, one thousand one hundred sixty five (1,165) shares; Mary Emma Flood Stebbins, one thousand one hundred sixty four (1,164)

(Plaintiff's Exhibit D)

shares; James Flood, one thousand one hundred sixty four (1,164) shares;

(f) Out of shares of the Rancho Santa Margarita, a corporation: Maud Lee Flood, two thousand nine hundred sixteen (2,916) shares; Mary Emma Flood Stebbins, two thousand nine hundred seventeen (2,917) shares; James Flood, two thousand nine hundred seventeen (2,917) shares;

(g) Out of shares of San Francisco Remedial Loan Association, a corporation: Maud Lee Flood, two hundred thirteen (213) shares; Mary Emma Flood Stebbins, two hundred thirteen (213) shares; James Flood, two hundred thirteen (213) shares;

(11) That there be and there is hereby awarded, set over and distributed to Maud Lee Flood, individually; to Mary Emma Flood Stebbins, and to James Flood, and to each of them severally, an undivided interest equal to twenty three eighty firsts (23/81sts) of all of the real property in Mendocino and Marin Counties, described in Schedules A and B attached to this decree;

(12) That there be and there is hereby awarded, set over and distributed to Maud Lee Flood, individually; to Mary Emma Flood Stebbins, and to James Flood, and to each of them severally, share and share alike,

(a) Cash in the sum of twenty seven thousand dollars (\$27,000);

(b) The following:

(1) Promissory note, appraised at four hundred dollars (\$400.00).

(2) Office furniture, appraised at six hundred dollars (\$600.00).

(Plaintiff's Exhibit D)

(3) Automobiles, appraised at two thousand six hundred dollars (\$2,600.00).

(4) Real property in the City and County of San Francisco, described in "Schedule C" attached to this decree;

(13) It is hereby further ordered, adjudged and decreed that all the rest, residue and remainder of the estate of said James L. Flood, deceased, of whatsoever nature and wheresoever situate, and any and all property belonging to said estate not now known or discovered which may belong to said estate or in which said estate may have any interest, and all other property, real, personal and mixed, of which the said James L. Flood died seized or possessed or in which he had any right, title, interest or estate at said time, or in which his estate has since acquired by operation of law, or otherwise, any right, title, interest or estate other than or in addition to that of said deceased at the time of his death. whether said property or said rights, titles, interests or estates be now known or discovered or not known or discovered and whether the same appear or do not appear of record, including any unexpended balance that may remain in the hands of the executor after all necessary or appropriate disbursements shall have been made by said executor out of the sum of \$71,163.58 ordered in the decree of settlement of Second Account and of Third Account and Fourth and Final Account and Supplemental Final Account of executor set apart to said executor as an amount estimated to be necessary to pay and discharge sums due and to become due on accounts and for liabilities enumerated and/or covered in said decree settling said accounts; be and the same are hereby awarded, set over and distributed as follows:

(Plaintiff's Exhibit D)

(a) Unto Maud Lee Flood, an undivided one-third thereof;

(b) Unto Mary Emma Flood Stebbins, an undivided one-third thereof;

(c) Unto James Flood, an undivided one-third thereof;

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[Seal Superior Court, County of San Mateo, California]

(14) It Is Hereby Further Ordered, Adjudged and Decreed that upon said executor (a) filing receipts of the distributees herein showing the receipt by said distributees of the properties hereby distributed to them, and (b) making accounting in respect of the amount ordered in the decree of settlement of Second Account and of Third Account and Fourth and Final Account and supplemental Final Account of executor to be set apart to the executor as hereinabove stated, said executor be forthwith discharged of her trust as such executor.

Done in open Court this 28th day of February, 1934.

Wm. F. James

Judge of the Superior Court.

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[Seal Superior Court, County of San Mateo, California]

I, James L. Flood, hereby make, publish and declare this as and to be my last Will.

FIRST

I hereby revoke all Wills and Codicils to Wills heretofore made by me.

(Plaintiff's Exhibit D)

SECOND

I hereby give and bequeath to The Roman Catholic Archbishop of San Francisco, a corporation sole, the sum of twenty thousand (20,000) dollars, to be divided in amounts to be fixed by it amongst the charitable institutions under its control; to The Protestant Episcopal Bishop of California, a corporation sole, the sum of twenty thousand (20,000) dollars, to be divided in amounts to be fixed by it amongst the charitable institutions under its control; to The St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation, the sum of twenty-five thousand (25,000) dollars; to San Francisco Protestant Orphanage Society, a corporation, the sum of twenty-five thousand (25,000) dollars; to Roman Catholic Orphan Asylum of San Francisco, a corporation, the sum of twenty-five thousand (25,000) dollars; to Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation, the sum of five thousand (5,000) dollars; to Pacific Hebrew Orphan Asylum and Home Society, a corporation, the sum of five thousand (5,000) dollars.

THIRD

I give and bequeath all shares of the capital stock of Flood Realty Company, a corporation, which I may own at the time of my death, to Maud Lee Flood and James E. Walsh, as trustees,

James L. Flood

(Page One)

[Seal Superior Court, County of San Mateo, California]

upon the trusts and for the uses and purposes hereinafter specified, namely:

(Plaintiff's Exhibit D)

- (a) Said trustees shall collect and receive the income from the trust estate during the life of the last survivor of the following named four persons: My wife, Maud Lee Flood, my sister, Cora Jane Flood, and my children, Mary Emma Flood and James Flood. Said four persons are hereinafter called the "primary beneficiaries".
- (b) A "primary share" of the income from the trust estate at any particular time shall be one of as many equal shares of the income at such time from the entire trust estate as shall represent the number of primary beneficiaries then living, plus one (1), if either (but not both) of my said two children shall at such time have died leaving issue then surviving, and plus two (2), if both of my said children shall at such time have died and each shall have left issue then surviving.
- (c) The trustees shall accumulate one primary share of the income from the trust estate for the benefit of my son James until he shall attain majority, and if and when he shall attain his majority the trustees shall pay over and deliver to my said son and there is hereby given and bequeathed to him if, when, and upon the condition that he attains his majority) all such accumulations. If my said son shall die before attaining his majority all accumulations theretofore made and then held for his benefit shall upon his death go and belong (and the

James L. Flood

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(Plaintiff's Exhibit D)

same are hereby given, devised and bequeathed) to his then living children, if he shall leave a child or children him surviving, or if he shall leave no child or children him surviving, then in equal shares to such of the primary beneficiaries as shall then be living, provided, however, that the then living issue of my daughter Mary Emma (if she shall theretofore have died leaving issue then surviving) shall take by right of representation of said Mary Emma the share of such accumulations which said Mary Emma would have taken if living.

- (d) From and after the time that my said son James shall attain his majority the trustees shall pay over and deliver to him one "primary share" of the net income (as and when received) from the trust estate.
- (e) The trustees shall pay over and deliver one "primary share" of the net income (as and when received) from the trust estate to each of the three other primary beneficiaries (namely, my said wife, my said sister, and my said daughter) during their respective lives.
- (f) If my said son shall die before the termination of the trust declared in this paragraph (Third), and shall leave issue him surviving, the issue of my said son shall take (and the trustee shall pay over and deliver to such issue) by right of representation of my said son, one "primary share" of the net income (as and when received) from the trust estate.
- (g) If my said daughter shall die before the termination

James L. Flood

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(Plaintiff's Exhibit D)

of the trust declared in this paragraph (Third), and shall leave issue her surviving, the issue of my said daughter shall take (and the trustees shall pay over and deliver to such issue) by right of representation of my said daughter, one "primary share" of the net income (as and when received) from the trust estate.

(h) The trusts created by this paragraph (Third) shall cease and determine upon the death of the last survivor of the above named primary beneficiaries, namely, my wife, my sister, and my two children, and upon the termination of said trust, all property then belonging to the trust estate shall go and belong and is hereby given, devised and bequeathed, and shall by the trustees be paid over and delivered, free and clear of any trust,

- (1) if both of my said children shall have left issue then surviving, then one-half to the then living issue of my said daughter (such issue to take by right of representation of my said daughter) and one-half to the then living issue of my said son (such issue to take by right of representation of my said son; or
- (2) if either my said son or my said daughter (but not both) shall have left issue then surviving, then to such then living issue of my said son or of my said daughter as the case may be (by right of representation of my said son or of my said daughter, as the case may be); or
- (3) if neither my said son nor my said daughter shall have left issue then surviving, then to

(Plaintiff's Exhibit D)

"The Regents of the University of California,"
a corporation, in trust, to apply the same

James L. Flood

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[Seal Superior Court, County of San Mateo, California]

to the uses and purposes of the University of
California.

- (i) I hereby authorize and empower the trustees of the trusts created in this paragraph (Third) to sell any property of the trust estate, real or personal, at either public or private sale, and with or without notice, as such trustees may determine, and without the order of any court, and to execute good and valid transfers, conveyances and assignments thereof; also to invest and reinvest the proceeds of sales of property and to purchase or acquire other property, all property so acquired with the proceeds of property given or bequeathed in trust to be held upon the same uses and trusts as are herein declared with respect to the property originally given and bequeathed in trust; also to borrow or lend such moneys as said trustees may deem best, and upon such securities as they may approve. I direct that no bond or other security be required of the trustees above named, or either of them, for the faithful performance of their duties as such trustees.
- (j) I authorize and empower the trustees of the trusts created in this paragraph (Third) to hold, so long as in their judgment it shall be proper so to do, all or any of the shares of the capital stock of Flood Realty Company herein bequeathed to them in trust,

(Plaintiff's Exhibit D)

and any other shares of the same corporation, or other corporate stocks or securities which they may by purchase or otherwise acquire as part of the trust estate, and

James L. Flood

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direct that such trustees shall not, nor shall either of them, be liable for any loss that may be incurred by reason of any depreciation in the value of any such corporate stocks or other securities while so held by them. The trustees shall have power, in person or by proxy, to represent and vote all shares of corporate stock belonging to the trust estate.

- (k) If for any reason one of the trustees of the trusts created by this paragraph (Third) shall be absent or for any other reason be unable to act as a trustee thereof, the other trustee (or if at any time there shall be only one trustee of such trusts, then such sole trustee) shall have and may exercise all rights, powers and authority which could otherwise be exercised by both trustees of such trusts, including the right, power and authority to represent and vote, or by proxy to authorize the representation and voting of, any shares of stock of any corporation constituting or forming a part of the trust estate.
- (l) If either of the trustees named in this paragraph (Third) shall fail or refuse to qualify or act as a trustee of the trusts created in this paragraph (Third), or if at any time one of the trustees of the trusts created by this paragraph (Third) shall die,

(Plaintiff's Exhibit D)

resign, or for any other reason cease to be or to act as such trustee, the remaining trustee shall have and is hereby given the right and power to fill by appointment the vacancy in the office of such trustee. Such appointment shall be evidenced by a written instrument signed and acknowledged by the trustee making the appointment, and by a

James L. Flood

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written acceptance of such appointment, signed and acknowledged by the person so appointed, which instruments of appointment and acceptance shall be filed in the office of the County Recorder of the County of San Mateo, State of California; and upon the execution and filing of such instruments of appointment and acceptance, the appointee named therein shall, without other instruments of transfer or assignment, become one of the trustees created by this paragraph (Third) and be vested with all rights, estates, interests and powers of a trustee of such trusts, including the power to fill the vacancy in the office of the other trustee, if and when such a vacancy shall occur.

FOURTH

I give and devise to my wife, Maud Lee Flood, an undivided one-third interest in all real property of which I may die seized or possessed, and to my daughter, Mary Emma Flood, an undivided one-third interest in all such real property.

(Plaintiff's Exhibit D)

FIFTH

I give and devise an undivided one-third interest in all real property of which I may die seized or possessed, to Maud Lee Flood and James E. Walsh, as trustees, upon the trusts and for the uses and purposes hereinafter specified, namely:

1.—The trustees shall collect and receive the income from the trust estate, and shall accumulate the net income therefrom for the benefit of my son, James Flood (hereinafter called "James"), during the minority of said James.

2.—If and when said James shall attain his majority,

James L. Flood

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the trusts created in this paragraph (Fifth) shall cease and determine, and said James shall thereupon have and receive (and there is hereby given, devised and bequeathed to him when and upon condition that he attains his majority), and the trustees shall thereupon delivery and convey to him all of the property of the trust estate, including all accumulations theretofore made or then held for his benefit.

3.—If said James shall die before attaining his majority, the trusts created by this paragraph (Fifth) shall cease and determine upon his death, and all property then held upon the trusts created by this paragraph (Fifth), including all accumulations theretofore made or at the time of the death of said James held for the benefit of said James, shall go and be-

(Plaintiff's Exhibit D)

long, and in such event is hereby given, devised and bequeathed, and shall be by the trustees delivered and conveyed,

- (a) if said James shall have left a child or children him surviving, to such child, or (if he shall have left more than one child him surviving) in equal shares to such children of said James; or
- (b) if he shall have left no child or children him surviving, then to my daughter Mary Emma Flood, if she be then living; or if she be not then living, but shall have left issue then surviving, then in equal shares to her then surviving issue; or if my said daughter Mary Emma Flood shall have theretofore died, leaving no issue then surviving, then to my wife Maud Lee Flood, if she be then living; *of ir* said Maud Lee Flood be not then living, then to my sister

James L. Flood

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[Seal Superior Court, County of San Mateo, California]

Cora Jane Flood if she be then living; or if my sister Cora Jane Flood be not then living, then to "The Regents of the University of California," a corporation, in trust, to apply such property to the uses and purposes of the University of California.

4.—I authorize and empower the trustees of the trusts declared in this paragraph (Fifth) to sell any property of the trust estate, real or personal, at

(Plaintiff's Exhibit D)

either public or private sale, and with or without notice, as they may determine, and without the order of any court, and to execute good and valid transfers, conveyances and assignments thereof; also to invest and reinvest the proceeds of sales of property, and to purchase or acquire other property, all property so acquired with the proceeds of property given or devised in trust to be held upon the same uses and trusts as are herein declared with respect to the property originally given and devised in trust; also to borrow or lend such sums of money as said trustees may deem best and upon such securities as they may approve. I direct that no bond or other security be required of the trustees above named, or either of them, for the faithful performance of their duties as such trustees. I further authorize and empower the trustees of the trusts created by this paragraph (Fifth) to exchange, upon such terms and for such consideration as they deem proper, all or any property of the trust estate for other property, real or personal, including promissory notes or other evidences of indebtedness, shares of the capital stock of Flood Realty Company, a corporation, or of other corporations, or other securities. All property acquired by or upon any such exchange shall be held upon the uses and trusts

James L. Flood

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which are herein declared with respect to the property originally given and devised by this paragraph

(Plaintiff's Exhibit D)

(Fifth). I authorize and empower said trustees to hold, as part of the trust estate, so long as in their judgment it shall be proper so to do, all or any shares of stock, promissory notes, or other evidences of indebtedness or other securities which they may, by purchase, exchange or otherwise, acquire as part of the trust estate; and direct that they shall not, nor shall either of them, be held liable for any loss that may be incurred by reason of any depreciation in the value of any such promissory notes, stock or other property while so held by them. The trustees shall have power, in person or by proxy, to represent and vote all shares of stock of any corporation belonging to the trust estate. If for any reason or at any time one of the trustees of the trusts created by this paragraph (Fifth) shall be absent or for any other reason unable to act as a trustee thereof, the other trustee (or if at any time there shall be only one trustee of such trusts, then such sole trustee) may exercise all the rights, power and authority to represent and vote, or by proxy to authorize the representation and voting of, any shares of stock of any corporation constituting or forming a part of the trust estate.

If either of the trustees named in this paragraph (Fifth) shall fail or refuse to qualify or act as the trustee of the trusts created in this paragraph (Fifth), or if at any time one of the trustees of the trusts created by this paragraph (Fifth) shall die, resign, or for any other reason cease to be or to act as such trustee, the remaining trustee shall have, and is hereby given, the right and power to fill by ap-

(Plaintiff's Exhibit D)

pointment the vacancy in the office of such trustee.
Such appoint-

James L. Flood

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[Seal Superior Court, County of San Mateo, California]

ment shall be evidence by a written instrument, signed and acknowledged by the trustee making the appointment, and by a written acceptance of such appointment, signed and acknowledged by the person so appointed, which instruments of appointment and acceptance shall be filed in the office of the County Recorder of the County of San Mateo, State of California; and upon the execution and filing of such instruments of appointment and acceptance, the appointee named therein shall, without other instrument or transfer or assignment, become one of the trustees created by this paragraph (Fifth), and be vested with all rights, estates, interests and powers of a trustee of such trusts, including the power to fill a vacancy in the office of the other trustee if and when such a vacancy shall occur.

SIXTH

I direct that all estate, legacy, inheritance, succession and similar taxes which may be levied or assessed upon or against my estate, or become payable in respect of, any gift, devise, bequest or other disposition of property herein contained, or in respect of any distributive share or part of my estate, shall be paid out of the rest, residue and remainder of my estate.

(Plaintiff's Exhibit D)

SEVENTH

I give, devise and bequeath the rest, residue and remainder of my estate in equal shares to my wife Maud Lee Flood, my daughter Mary Emma Flood, and my son James Flood.

EIGHTH

I appoint as the executors of this Will my wife, Maud James L. Flood

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[Seal Superior Court, County of San Mateo, California]

Lee Flood, and my friend, James E. Walsh, and direct that no bond shall be required of them or either of them for the faithful performance of their duties as such executors. I authorize my said executors to sell any property of my estate, real or personal, at either public or private sale, and with or without notice, as they may determine, and without obtaining the order of any court therefor, and to make good and valid transfers, grants and conveyances thereof.

In Witness Whereof, I have hereunto and at the foot of each of the eleven preceding pages hereof, set my hand, this 16th day of November, 1920.

JAMES L. FLOOD

Witnesses:

Garret W. McEnerney residing at 2070 Jackson Street
San Francisco

Darrell W. Daly residing at 21 Beulah St.
San Francisco

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[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

The foregoing instrument was signed and subscribed by James L. Flood, the person named therein, at the City and County of San Francisco, State of California, on the 16th day of November, 1920, in the presence of us, both present at the same time, and was at the time of his so subscribing the same, acknowledged and declared by him to us to be his Last Will and Testament; and thereupon we, at his request and in his presence and in the presence of each other, subscribed our names as witnesses thereto.

Garret W. McEnerney residing at 2070 Jackson St.
San Francisco

Darrell W. Daly residing at 21 Beulah St.
San Francisco

(Endorsed) Filed in the Office of the County Clerk of San Mateo County, Calif. Feb 24 1926 Elizabeth M. Kneese, County Clerk By G. R. Winter Dep. Clerk

(Endorsed) Filed in the Superior Court of the State of California in and for the County of San Mateo Mar 11 1926 Elizabeth M. Kneese, Clerk By E. L. Falvey Deputy Clerk

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[Seal Superior Court, County of San Mateo, California]

SCHEDULE A.

Real property situate in the County of Mendocino, State of California, of which distribution is made by this decree, namely:

All those certain parcels of land situate, lying and being in Mendocino County, State of California, which

(Plaintiff's Exhibit D)

together constitute the tract of land of 23,662.8 acres, more or less, and being the tract of lands situate about 40 miles due north of the town of Ukiah, in said Mendocino County, and which tract forms a part of Townships numbered 20, 21 and 22 North, Range 12 West, and a part of Townships numbered 21 and 22 North, Range 13 West, M. D. B. & M., as follows:

First:

In Township 20 North, Range 12 West, M. D. B. & M.
 All of Section 5 containing.....643.32 acres
 All of Section 6 containing.....628.17 acres
 All of Section 7 containing.....617.60 acres
 West half of Section 8 containing.....320 acres

Second:

In Township 21 North, Range 12 West, M. D. B. & M.
 The Northwest 1/4 of Section 3 contain-
 ing160 acres
 All of Section 4 containing.....640 acres
 All of Section 5 containing.....652.88 acres
 All of Section 6 containing.....640.04 acres
 All of Section 7 containing.....645.92 acres
 All of Section 8 containing.....640 acres
 North half of Northwest 1/4 of Section 9,
 containing 80 acres
 North half of Northeast 1/4 of Section 9,
 containing 80 acres
 Southeast 1/4 of Northeast 1/4 of Section
 9, containing..... 40 acres
 East 1/2 of Southeast 1/4 of Section 9,
 containing 80 acres
 North half of Section 17 containing.....320 acres

(Plaintiff's Exhibit D)

All of Section 18 containing.....645.66 acres

All of Section 19 containing.....644.20 acres

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South half of Section 20 containing.....320 acres

All of Section 21 containing.....640 acres

All of Section 29 containing.....640 acres

All of Section 30 containing.....642.48 acres

All of Section 31 containing.....640.84 acres

All of Section 32 containing.....640 acres

West 1/2 of Northwest 1/4 of Section 33,
containing 80 acres

West 1/2 of Southwest 1/4 of Section 33,
containing 80 acres

Third:

In Township 21 North, Range 13 West, M. D. B. & M.

All of Section 1 containing.....640 acres

All of Section 2 containing.....640 acres

Northeast 1/4 of Section 3 containing.....160 acres

East 1/2 of Section 11 containing.....320 acres

All of Section 12 containing.....640 acres

North 1/2 of Section 13 containing.....320 acres

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Fourth:

In Township 22 North, Range 12 West, M. D. B. & M.

All of Section 27 containing.....640 acres

All of Section 28 containing.....640 acres

North 1/2 of Section 31 containing.....320 acres

Southeast 1/2 of Section 31 containing.....161.57 acres

All of Section 32 containing.....640 acres

All of Section 33 containing.....640 acres

All of Section 34 containing.....640 acres

(Plaintiff's Exhibit D)

Fifth:

In Township 22 North, Range 13 West, M. D. B. & M.

All of Section 3 containing.....643.12 acres

South 1/2 of Section 10 containing.....320 acres

All of Section 15 containing.....640 acres

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All of Section 22 containing.....640 acres

All of Section 23 containing.....640 acres

All of Section 26 containing.....640 acres

All of Section 27 containing.....640 acres

All of Section 34 containing.....640 acres

All of Section 35 containing.....640 acres

All of Section 36 containing.....640 acres

The foregoing parcels constitute a tract of land
containing 23,662.8 acres, more or less;

Together with the buildings and improvements thereon
and all and singular the tenements, hereditaments and
appurtenances thereunto belonging or in anywise apper-
taining and the reversion and reversions, remainder and
remainders, rents, issues and profits thereof.

[Seal Superior Court, County of San Mateo, California]

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SCHEDULE B

Real property situate in the County of Marin,
State of California, of which distribution is
made by this decree, namely;

All those certain parcels of land situate, lying and
being in Marin County State of California, and particu-
larly described as follows:

(Plaintiff's Exhibit D)

First:

Commencing at a point in the Easterly line of Lincoln Avenue, formerly known as Petaluma Avenue, where the same crosses the depression in the Point San Pedro Ridge known as the Dixon or Allman Puerto Suello, said point being in the Northerly line of the corporate limits of the City of San Rafael, thence Southerly along said Easterly line of said Lincoln Avenue 496.1 feet to the most westerly corner of the lot of land conveyed by William T. Coleman to John Allman by deed dated November 5th, 1873, and recorded in Volume "L" of Deeds, page 408, Marin County Records, thence along the Northwesterly line of the said Allman Lot North $61^{\circ} 15'$ East 627.2 feet to the Northerly corner of said Allman Lot, thence South $28^{\circ} 15'$ East 600.0 feet to the Easterly corner of said Allman Lot, thence continuing South $28^{\circ} 15'$ East 100.0 feet to the East corner of Lot 1, Block K, of Glen Park Addition, Coleman Addition to San Rafael, and thence continuing in the same direction to the center of Mountain View Avenue, sometimes called Glen Park Avenue, thence along the center of Mountain View Avenue, in a Northeasterly direction, and along the center of Glen Park Avenue in a southeasterly direction, as said Avenues are laid down and delineated on Map of Coleman's Addition to San Rafael, filed December 28th, 1888, in Map Book 1, Page 39, Marin County Records, to the intersection of the center line of Glen Park Avenue with the center line of an unnamed street connecting Villa Avenue with Glen Park Avenue opposite to the Southeasterly corner of Block G of said Glen Park Addition,

[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

thence continuing along the center line of Glen Park Avenue, South $46^{\circ} 01'$ East 147.4 feet, South $76^{\circ} 14'$ East 100.0 feet, North $66^{\circ} 48'$ East 100.0 feet, North $52^{\circ} 33'$ East 115.8 feet; North $41^{\circ} 07'$ East 154.8 feet, North $71^{\circ} 07'$ East 97.8 feet; South $5^{\circ} 34'$ East 151.3 feet, South $37^{\circ} 24'$ East 107.0 feet; South $68^{\circ} 27'$ East 176.4 feet, North $79^{\circ} 19'$ East 134.5 feet; South $64^{\circ} 59'$ East 152.1 feet, to intersection with Linden Lane, thence continuing on center line of Glen Park Avenue, North $62^{\circ} 20'$ East 103.9 feet, North $62^{\circ} 20'$ East 300.0 feet; North $48^{\circ} 04'$ East 134.4 feet; North $77^{\circ} 14'$ East 132.3 feet; North $62^{\circ} 31'$ East 157.7 feet; North $41^{\circ} 43'$ East 112.5 feet; North $31^{\circ} 35'$ East 167.0 feet; North $66^{\circ} 25'$ East 161.1 feet; North $81^{\circ} 08'$ East 130.0 feet; North $49^{\circ} 44'$ East 138.5 feet, to the intersection of the center line of Mountain View Avenue, thence along the center line of Mountain View Avenue South $33^{\circ} 24'$ West 140.3 feet and South $27^{\circ} 44'$ West 59.0 feet to a point distant North $62^{\circ} 16'$ West 25.0 feet from the Northwest corner of the Tract of land conveyed by William T. Coleman to Charlotte L. Lichtenberg by Deed dated February 16th, 1874, and recorded in Volume "P" of Deeds at page 364, Marin County Records, thence South $62^{\circ} 16'$ East 25.0 feet to said Northwest corner of the Lichtenberg property, thence along the Northerly line of said Lichtenberg property, South 73° East 448.0 feet; thence along the East line of said property South $18^{\circ} 03'$ West 216.2 feet to the Northwest corner of the lot conveyed by William T.

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Coleman to Harry W. Syz, by Deed dated August 15th, 1887, and recorded in Volume 6 of Deeds at Page 137,

(Plaintiff's Exhibit D)

Marin County Records thence South 74° 30' East along the North line of Syz lot to the West line of lot conveyed by Georgie T. Page to Leavitt Baker by Deed dated December 17th, 1921 and recorded in Volume 237 of [Seal Superior Court, County of San Mateo, California]

Deeds at Page 45, Marin County Records; thence North 15° 26' East to the Northwest corner of said Baker lot, thence along the North line of Baker lot South 75° 33' East 329.09 feet and South 76° 34' East 125.26 feet to Northeast corner of said Baker lot, thence North 9° 25' East 250.26 feet to the Northwest corner of the lot of land conveyed by James L. Flood to L. R. Hardy, by Deed dated March 15th, 1906 and recorded in Volume 98 of Deeds at Page 350, Marin County Records, said point being on the Southerly line of Gold Hill Grade, thence along the Southerly line of Gold Hill Grade, South 48° 19' East 112.4 feet; North 70° 56' East 171.3 feet; South 61° 02' East 51.6 feet; South 64° 16' East 46.3 feet; South 79° 27' East 105.1 feet; North 82° 11' East 92.1 feet; South 19° 01' East 168.1 feet; South 56° 48' East 163.8 feet; North 64° East 95.7 feet; South 53° 05' East 69.1 feet, to the Northwest corner of the lot conveyed by James L. Flood to Anne Sheridan, by Deed dated December 6th, 1904 and recorded in Volume 90 of Deeds at Page 256, Marin County Records; thence continuing along the Southerly line of Gold Hill Grade, North 88° 01' East 68.7 feet, North 52° 44' East 53.7 feet; North 35° 03' East 88.4 feet; South 32° 44' East 46.8 feet; South 42° 49' East 54.9 feet; South 63° 25' East 211.1 feet; North 74° 42' East 57.4 feet, thence leaving the Southerly line of Gold Hill Grade, thence North 33° 29' East 30.34 feet to the center line of Gold

(Plaintiff's Exhibit D)

Hill Grade and the Westerly line of the tract of land conveyed by James L. Flood to the San Rafael Development Company, by Deed dated March 22, 1906, and recorded in Volume 99 of Deeds at page 42, Marin County Records; thence along the boundary line of the lands conveyed to the said San Rafael Development Company, North $12^{\circ} 57'$ West 80.8 feet to an iron bolt about 80.0 feet Westerly from the center of [Seal Superior Court, County of San Mateo, California]

Green Gulch, thence ascending the Westerly side of said Green Gulch North 44° East 652.2 feet to an iron bolt, North $36^{\circ} 10'$ East 176.6 feet to an iron bolt, North $12^{\circ} 19'$ East 185.8 feet to an iron bolt, and North $50^{\circ} 58'$ East 101.3 feet to an iron bolt, thence crossing said Green Gulch and ascending South $88^{\circ} 43'$ East 673.5 feet to an iron bolt in the summit of a ridge, thence descending North $71^{\circ} 42'$ East 385.0 feet to an iron bolt, thence South $63^{\circ} 42'$ East 778.2 feet, thence South $78^{\circ} 05'$ East 360.4 feet to an iron bolt driven in the line fence marking the line between the "Towne Ranch" and the lands of James L. Flood; thence along said line and fence, North 1° West 4185.0 feet to the summit of the Point San Pedro Ridge, being the Southerly line of what is called the Remilliard Ranch, thence Westerly along the Summit of said San Pedro Ridge, which Ridge is the Southerly boundary line of what are commonly known as the Remilliard, Stetson and Wagner Ranches, to the point of beginning. Excepting from the above described tract so much of the so-called "Bacon Tunnel Lot" as the same is described in Liber "11" of Deeds, page 258, after deducting the portion thereof reconveyed to Messrs. Mackay and Flood, as described in

(Plaintiff's Exhibit D)

Liber "18" of Deeds, at page 199 of the Records of said Marin County. Also excepting therefrom the right of way for a pipe line from said Tunnel lot as the same is described in Liber "17" of Deeds, page 326, of said records;

Second:

Commencing at the Northeast corner of Lot 61, as said Lot 61 is laid down and delineated upon that certain map entitled "Map of the Chula Vista Terrace" filed August 1st, 1912, in Map Book "4" Page 27, in Marin

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County Records; thence North 29° 44' West 104.4 feet; North 73° 38' West 103.27 feet to the Northwest corner of Lot 64 of said Chula Vista Terrace, thence North 66° 36' West 99.90 feet to the Northwest corner of Lot [Seal Superior Court, County of San Mateo, California]

66 of said Chula Vista Terrace on the South side of Chula Vista Drive, thence along the said Southerly line of Chula Vista Drive, South 64° 11' West 152.29 feet; South 46° 11' West 425.61 feet; South 83° 39' West 86.90 feet, South 70° 39' West 45.86 feet; South 89° 02' West 40.1 feet; North 83° 42' West 69.15 feet; North 68° 06' West 113.67 feet; South 65° 31' West 51.89 feet; South 29° 18' West 95.34 feet; South 18° 47' East 55.58 feet; South 48° 58' East 112.35 feet; South 13° 37' East 178.88 feet; South 30° 10' East 90.26 feet; South 11° 32' West 73.10 feet; South 10° 15' East 190.77 feet; South 20° 45' East 223.51 feet; South 1° 02' West 99.55 feet; thence leaving the Easterly line of Chula Vista Drive, South 77° 26' West 586.73 feet, to a point in the Westerly boundary of the tract of land described in the

(Plaintiff's Exhibit D)

Deed from James L. Flood and wife to James W. Keyes, dated May 22nd, 1911, and recorded in Volume 136 of Deeds at Page 12, Marin County Records; thence along said Westerly boundary South $20^{\circ} 04'$ East 333.90 feet, South 87° East 217.8 feet to the Northwest corner of the Mountain Park Reservation, North $75^{\circ} 30'$ East 66.0 feet to the most Northerly corner of said Mountain Park Reservation, thence South $35^{\circ} 28'$ East 145.0 feet to the Northwest corner of that certain tract of land conveyed by J. W. Mackay and James L. Flood to Louis B. Parrott by Deed dated July 10th, 1890, and recorded in Volume 12 of Deeds at Page 442, Marin County Records; thence along the Northerly side of said Parrott Tract North $86^{\circ} 02'$ East 971.93 feet to the Westerly line of a forty-foot street, thence along said Westerly line, North $55^{\circ} 33'$ West 68.53 feet, North $3^{\circ} 06'$ West 94.69 feet; North $53^{\circ} 56'$ East 277.92 feet; South $83^{\circ} 40'$ East 99.85 feet to the Westerly line of Prospect Place, thence along the Westerly line of Prospect Place, North $38^{\circ} 57'$ West 254.85 feet, North $50^{\circ} 59'$ West 139.04 feet, North $62^{\circ} 13'$ West 173.25 feet, North $14^{\circ} 44'$ East 92.03 feet; North $5^{\circ} 29'$ West 23.35 feet;

[Seal Superior Court, County of San Mateo, California]

North $42^{\circ} 08'$ West 133.27 feet; North $44^{\circ} 08'$ West 111.73 feet; North $15^{\circ} 03'$ West 57.97 feet; North $64^{\circ} 30'$ East 64.16 feet; North $85^{\circ} 30'$ East 180.81 feet; North $51^{\circ} 38'$ East 67.93 feet; North $31^{\circ} 14'$ East 105.99 feet; North $53^{\circ} 03'$ East 59.34 feet; thence leaving Prospect Place, and running Northerly along a curve to the right, having a radius of 497.68 feet and a Long Chord bearing North $18^{\circ} 52'$ West, a distance of 216.94 feet to the Westerly line of Lincoln Avenue, thence along

(Plaintiff's Exhibit D)

the Westerly line of Lincoln Avenue, North 25° 33' West 60.51 feet, North 10° 54' West 68.30 feet and North 13° 01' West 204.26 feet to place of commencement. Excepting, however from the above described premises all portions of the same heretofore dedicated or conveyed for purposes of public roads or highways. Also excepting Lots number 9, 12, 36, 37, 47, 80, 117, 118, 119, 120, 133, 134, 136, 137, 139, 152, 153, 154, 160, 161, as shown and delineated upon that certain map entitled "Map of Chula Vista Terrace," filed August 1st, 1912, in Map Book "4" page 27, in the office of the County Recorder of the County of Marin, State of California;

Third:

Commencing at a point on the Northerly line of the Toll Road in the City of San Rafael, said point being the Southeast corner of the tract of land conveyed by James L. Flood to the City of San Rafael, by Deed dated December 19th, 1913 and recorded in Volume 155 of Deeds, Page 445, Marin County Records, thence Northerly along the Easterly boundary of said City of San Rafael Tract, 739.84 feet to the South line of the tract of land conveyed by James L. Flood to the City of San Rafael, by deed dated March 3rd, 1920 and recorded in [Seal Superior Court, County of San Mateo, California]

Volume 211 of Deeds at Page 389, Marin County Records; thence Easterly along the Southerly line of said last named tract 1190.0 feet, more or less, to the Westerly boundary line of East San Rafael, as laid down and designated on "Map of East San Rafael, Marin Co." filed on January 21st, 1908 in Map Book 2, Page 109, Marin County Records; thence Southerly along the Westerly

(Plaintiff's Exhibit D)

boundary of said East San Rafael to the Northerly line of the Toll Road; thence Westerly along the Northerly line of said Toll Road, 990.0 feet, more or less, to place of beginning;

Fourth:

Beginning at a point on the South line of the tract of land conveyed by David Porter to William T. Coleman by Deed dated May 27th, 1871 and recorded in Volume "J" of Deeds at Page 99, said point being the Southeast corner of the tract of land conveyed by James L. Flood to W. L. Courtright by Deed dated April 9th, 1910, and recorded in Volume 127 of Deeds at Page 483, Marin County Records, running thence along the East line of said Courtright Tract, North $47^{\circ} 23'$ East 184.9 feet; North $30^{\circ} 11'$ East 203.3 feet; North $13^{\circ} 27'$ East 188.4 feet; North $42^{\circ} 17'$ East 160.2 feet; North $80^{\circ} 45'$ East 109.5 feet; North $63^{\circ} 00'$ East 62.2 feet; North $29^{\circ} 04'$ East 111.9 feet; North $59^{\circ} 26'$ East 151.6 feet; North $3^{\circ} 58'$ East 81.0 feet; North $61^{\circ} 48'$ East 177.3 feet; North $31^{\circ} 53'$ East 121.9 feet; North $2^{\circ} 52'$ East 57.1 feet; North $12^{\circ} 02'$ West 48.4 feet; North $36^{\circ} 52'$ West 127.5 feet; North $43^{\circ} 33'$ East 156.2 feet; North $45^{\circ} 18'$ East 199.8 feet; North $4^{\circ} 31'$ West 181.1 feet; North $26^{\circ} 41'$ West 67.5 feet, to the most easterly corner of Lot 12 of Picnic Valley; thence North $29^{\circ} 40'$ West 208.1 feet and North $4^{\circ} 50'$ East 398.6 feet to the Southerly line of the San Rafael and San Quentin County Road; thence along said Southerly line, South $62^{\circ} 11'$ East 118.86 feet; South $81^{\circ} 11'$ East 1408.22 feet, [Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

South 81° 27' East 142.04 feet; South 61° 18' East 297.54 feet; South 88° 14' East 118.98 feet; South 54° 30' East 184.66 feet; South 51° 37' East 42.72 feet; South 14° 57' East 105.8 feet; South 49° 50' East 193.72 feet; South 32° 01' East 84.76 feet; South 16° 43' East 159.76 feet; South 35° 37' East 71.72 feet; North 86° 05' East 227.4 feet; South 59° 21' East 272.57 feet; South 39° 19' East 91.23 feet; South 28° 23' West 182.56 feet to the Northeast corner of Lot 28 of Block 4, as said Lot and Block are laid down on "Map of Lomita Park," filed March 19th, 1892, in Map Book 1, Page 66, Marin County Records; thence leaving said County Road, North 66° 40' West 150.0 feet to the Northwest corner of said Lot 28 of Block 4 of Lomita Park, thence South 23° 20' West 600.0 feet to the Northeast corner of Lot 1 of said Block 4 of Lomita Park, thence North 82° 09' West 291.27 feet to the Northwest corner of Lot 1 of said Block 4, and the line of a 50-foot road, thence along the line of a fifty-foot road: North 48° 35' West 88.62 feet; South 52° 08' West 98.96 feet; South 1° 00' East 96.75 feet; South 20° 17' East 288.08 feet; South 22° 49' West 110.64 feet; South 22° 25' East 93.46 feet; South 9° 57' West 25.51 feet; South 42° 17' West 132.67 feet; South 0° 59' East 75.63 feet; South 18° 28' West 136.96 feet; thence along the Easterly line of the Tiburon Boulevard as conveyed by James L. Flood, et al., to the County of Marin, by Deed dated January 8th, 1897, and recorded in Volume 44 of Deeds at Page 111, Marin County Records; thence along the line of said Tiburon Boulevard: South 61° 17' East 117.03 feet; South 86° 37' East 96.46 feet; South 50° 23' East 1.75 feet; South 1° 01' West 33.3 feet; South 32° 29' West 53.3 feet; South 34° 31' East 88.59 feet;

(Plaintiff's Exhibit D)

South 51° 43' East 356.03 feet; East 151.9 feet; South 57° 21' East 172.35 feet; North 89° 17' East 276.43 feet;

[Seal Superior Court, County of San Mateo, California]

North 63° 46' East 126.49 feet; North 88° 34' East 81.88 feet; South 63° 26' East 115.57 feet; South 46° 26'

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East 60.58 feet; South 22° 12' East 151.01 feet; South 59° 16' East 274.06 feet; South 41° 20' East 37.99 feet; South 20° 20' East 38.81 Feet; South 4° 50' East 40.58 feet; South 10° 20' West 38.91 feet; South 31° 00' West 38.97 feet; South 47° 11' West 92.03 feet; South 58° 03' West 149.81 feet; South 16° 54' West 203.07 feet; North 57° 00' West 179.33 feet; South 52° 54' West 63.82 feet to the South boundary line of the tract of land conveyed by David Porter to William L. Coleman by deed dated May 27th, 1871, and recorded in Volume "J" of Deeds at Page 99, Marin County Records; thence along said South boundary line North 57° 00' West 273.18 feet to Station "C 16" of said boundary line, thence continuing along said boundary line, South 80° 30' West 867.9 feet; South 56° 15' West 478.5 feet; North 79° 45' West 264.0 feet; North 62° 15' West 132.0 feet; North 41° 45' West 343.2 feet; North 53° 45' West 632.28 feet; North 26° 00' West 205.92 feet; North 80° 30' West 316.8 feet; South 86° 00' West 353.10 feet; North 23° 00' West 514.8 feet; North 73° 00' West 306.90 feet; North 51° 45' West 554.4 feet; North 32° 45' West 228.0 feet, to the place of beginning. Excepting therefrom any County Roads which may be included in said description;

(Plaintiff's Exhibit D)

Fifth:

Beginning at an angle point in the North line of the San Rafael and San Quentin County Road at the end of the fourth course of said road, as said road is described in the Deed from John W. Mackay and James L. Flood to the County of Marin, dated January 16th, 1891, and recorded in Volume 16 of Deeds at page 25, Marin County Records, thence along said Northerly line of said road, South $14^{\circ} 57'$ East 106.8 feet, South $49^{\circ} 50'$ East

[Seal Superior Court, County of San Mateo, California]

184.28 feet, South $32^{\circ} 01'$ East 102.24 feet, South $16^{\circ} 43'$ East 153.84 feet, South $35^{\circ} 37'$ East 28.28 feet, North $86^{\circ} 05'$ East 212.6 feet, South $59^{\circ} 21'$ East 301.83 feet to the right of way of the Northwestern Pacific Railroad Company, thence Northwesterly along said right of way 975.0 feet to place of beginning;

Sixth:

Lots 1, 2, 15, 16 and 28, Block 4, and Lots 3, 4, 9, 10, 11, 12, Block 6, as said lots are laid down and designated on "Map of Lomita Park," filed in the Office of the County Recorder of the County of Marin, State of California, on March 19th, 1892, Map Book 1, page 66;

Seventh:

Commencing at a point distant North $29^{\circ} 35'$ East 7.2 feet from the westerly corner of the tract of land conveyed by William T. Coleman to Thomas O'Connor by a Deed dated November 18th, 1886 and recorded in Liber 4 of Deeds at Page 273, Marin County Records, said point being in the middle of a 60 foot road, thence along the middle of said 60-foot road, South $89^{\circ} 17'$

(Plaintiff's Exhibit D)

West 86.9 feet; South 66° 12' West 147.5 feet; North 72° 13' West 327.8 feet; North 22° 26' West 84.6 feet; North 56° 46' West 49.7 feet; North 85° 44' West 249.1 feet; North 60° 54' West 158.5 feet; North 24° 14' West 54.5 feet; North 13° 45' East 124.2 feet; North 17° 53' West 67.7 feet; North 58° 53' West 132.3 feet; North 36° 00' West 263.00 feet; North 11° 25' West 83.4 feet; North 16° 51' East 201.5 feet; North 13° 30' West 128.00 feet; North 7° 10' East 64.6 feet; North 30° 47' East 130.3 feet; North 18° 56' West 70.0 feet; North 58° 31' West 59.8 feet; North 82° 48' West 204.8 feet; South 68° 38' West 203.5 feet; South 71° 43' West 116.6 feet; North 85° 22' West 383.6 feet; North 68° 05' West 91.9 feet; North 53° 44' West 244.3 feet; North 44° 26' West 176.2 feet; North 13° 29' West

[Seal Superior Court, County of San Mateo, California]

404.8 feet; North 49° 52' West 95.3 feet; North 78° 19' West 116.2 feet; South 79° 05' West 162.5 feet; North 70° 53' West 81.7 feet; North 50° 48' West 106.0 feet; North 37° 24' West 186.9 feet; North 71° 51' West 194.6 feet, thence leaving said road, and running along the Southeasterly boundary line of the tract of land conveyed by John W. Mackay and James L. Flood to Rebecka Helene Daly by Deed dated July 10th, 1894, and recorded in Vol. 30 of Deeds at Page 234, Marin County Records, North 36° 49' East 670.9 feet to the center of the right of way of the Northwestern Pacific Railroad, thence along said center line North 50° 34' West 1575.8 feet to the center line of Simms Street, thence along the center line of said Simms Street North 39° 48' East 30.0 feet; North 85° 42' East 86.4 feet, North 72° 02' East 235.8 feet; North 48° 47' East 58.2 feet; North 58°

(Plaintiff's Exhibit D)

01' East 88.1 feet; North 60° 38' East 88.0 feet; North 77° 10' East 83.2 feet; North 88° 40' East 166.0 feet; North 61° 46' East 126.7 feet; North 43° 47' East 254.3 feet to the center line of the Toll Road, thence along the center line of said Toll South 37° 10' East 213.9 feet; South 39° 59' East 5739.5 feet to the center line of the Right of Way of the Northwestern Pacific Railroad, thence along said center line of said Railroad, Northwesterly 580.00 feet more or less to a point in line with the westerly line of the O'Connor Tract, hereinbefore referred to, thence South 29° 35' West along the westerly line of said O'Connor Tract, 322.0 feet to place of beginning;

Excepting therefrom:

- (a) The right of way of the Roads herein mentioned;
- (b) The right of way conveyed to the Bay Counties Railway, by deed dated December 5th, 1907, and recorded in Volume 112 at Page 179, Marin County Records;
- (c) The right of way conveyed to the Pacific Gas and Electric Company by deed dated January 11th, 1913, recorded in Vol. 148 of Deeds at Page 326, Marin County Records;
- (d) The right of way conveyed to the Pacific Telephone & Telegraph Company, by Deed dated May [Seal Superior Court, County of San Mateo, California] 7th, 1912 and recorded in Volume 144 of Deeds at Page 106, Marin County Records;
- (e) The right of way conveyed by William T. Coleman to the Marin County Water Company, by

(Plaintiff's Exhibit D)

Deed dated September 9th, 1874, recorded in Volume "M" of Deeds at Page 77, Marin County Records;

(f) The right of way of the Northwestern Pacific Railroad Company;

Eighth:

Commencing at the most Southerly corner of Lot 11 of Block 26, as said lot and block are laid down and so designated on "Map of East San Rafael," filed on January 21st, 1908 in Map Book 2, Page 109, Marin County Records, said point of commencement being on the Northeasterly line of San Rafael and San Quentin Toll Road, thence along the exterior boundary line of said East San Rafael, North 41° 07' East 201.8 feet; North 24° 01' West 731.0 feet; North 14° 31' West 1239.6 feet; North 9° 30' West 783.5 feet; North 18° 52' West 224.0 feet; North 2° 03' West 675.9 feet; North 8° 05' East 539.0 feet; North 14° 21' East 2795.1 feet; North 14° 21' East 404.1 feet to the South line of the San Rafael Canal, thence along said south line South 44° 00' East to the angle point in the North line of Lot 13-1/2, Section 2, Township 1 North, Range 6 West M.

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D. M., thence continuing along the South line of San Rafael Canal, East 2178 feet and South 62° 30' East 5940.0 feet to the line of Nine feet of water at lowest stage of the tide, thence along said line of Nine feet of water, Southerly to the Northeast corner of Tide Lot 29, Section 12 of Township 1 North, Range 6 West, M. D. M., thence West 41 chains, more or less, to the Northeast corner of Lot 25 in said Section 12; thence

(Plaintiff's Exhibit D)

South to the center line of the Northwestern Pacific Railroad, Right of Way, thence westerly along said center line to the intersection of said center line with the Northeast line of the San Rafael and San Quentin Toll Road, thence Northwesterly along the northeast line of said Toll Road to the point of beginning. Excepting there-

[Seal Superior Court, County of San Mateo, California]

from, Lots 7-1/2, 8-1/2, 10, 11, 17, 18, 24, 27 and 31 of Section One; Lot 16, Section Two; Lots 2 and 17, Section 11, and Lots 2, 3, 4, 5, 6, Section Twelve, Township 1 North, Range 6 West, M. D. M.; also excepting right of way conveyed to the City of San Rafael for outfall sewer, by Deed dated January 27th, 1899, and recorded in Volume 55 of Deeds at Page 1, Marin County Records; and excepting right of way of Northwestern Pacific Railroad;

Together with the buildings and improvements thereon and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

The above described tracts shall not be deemed to include any of the lands or interests in lands conveyed in the following instruments of record in the office of the County Recorder for the County of Marin, State of California, to the grantees named therein, respectively, but all of said lands and interests in lands so conveyed as aforesaid, are excluded and excepted therefrom:

- (a) Deed of Grant executed May 6, 1926, by James E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, de-

(Plaintiff's Exhibit D)

ceased, to the City of San Rafael, a municipal corporation, recorded June 5, 1926, in Liber 96 of Official Records, Marin County, at page 416;

- (b) Deed of Grant executed June 29, 1926, by James E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, deceased, to B. R. Miller, recorded June 30, 1926, in Liber 101 of Official Records, Marin County, at page 193;

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- (c) Deed of Grant executed June 25, 1927, by James E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, deceased, to Edwin H. Grandke, recorded June 28, 1928, in Liber 121 of Official Records Marin County, at page 143;
- (d) Deed of Grant executed June 25, 1927, by James [Seal Superior Court, County of San Mateo, California] E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, deceased, to Marin Municipal Water District, a Public Corporation, recorded July 22, 1927, in Liber 123 of Official Records, at page 242;
- (e) Deed of Grant of Right of Way for highway purposes executed October 15, 1928, by James E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, deceased, to the State of California, recorded October 25th, 1928, in Liber 159 of Official Records, Marin County, page 255;

(Plaintiff's Exhibit D)

- (f) Deed of Grant of Right of Way for highway purposes executed September 19, 1930 by Maud Lee Flood and James E. Walsh as the duly appointed, qualified and acting executors of the will of James L. Flood, deceased, to the State of California, recorded October 17, 1930, in Liber 203 of Official Records, Marin County, at page 289;
- (g) Quitclaim Deed executed February 18, 1931, by Maud Lee Flood and James E. Walsh as the duly appointed, qualified and acting executors of the will of James L. Flood, deceased, to Northwestern Pacific Railroad Company, a corporation, recorded March 12, 1931 in Liber 210 of Official Records, Marin County, at page 255;
- (h) Deed of Grant of Right of Way for transmission and distribution of electricity executed October 23, 1930 by Maud Lee Flood and James E. Walsh as the duly appointed, qualified and acting executors of the will of James L. Flood, deceased, to

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Pacific Gas and Electric Company, a corporation, recorded April 11, 1931 in Liber 228 of Official Records, Marin County, at page 7.

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[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

SCHEDULE C

Real property situate in the City and County of San Francisco, State of California, of which distribution is made by this decree, namely;

All that certain piece or parcel of land situate, lying and being in the City and County of San Francisco, State of California, and bounded and described as follows, to-wit:

Beginning at the Northwest corner of Thirty-first Avenue and Dock Street; thence northwesterly along the Northerly line of Thirty-first Avenue six hundred (600) feet to the easterly line of Ship Street; thence North-easterly along the Easterly line of Ship Street two hundred (200) feet to the Southerly line of Thirtieth Avenue; thence Southeasterly along the Southerly line of Thirtieth Avenue six hundred (600) feet to the Westerly line of Dock Street; and thence Southwesterly at right angles and along the last named line, two hundred (200) feet to the place of beginning. Being twenty-four (24) lots numbered from one (1) to twenty-four (24), inclusive, and comprising all of Block numbered Eight Hundred and Forty (840).

Together with the buildings and improvements thereon and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and reversion and reversions, remainder and remainders, rents, issues and profits thereof.

[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

State of California, County of San Mateo—ss.

I, W. H. Augustus, County Clerk of the County of San Mateo, State of California, and ex-Officio Clerk of the Superior Court thereof, do hereby certify the foregoing attached to be a full, true and correct copy of the original Decree of Final Distribution, Copy of Last Will and Testament and Schedules A, B, and C thereto attached in the within entitled Matter action as the same appears on file and of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Superior Court, at my office in the County of San Mateo, this 27th day of June, 1945.

(Seal)

W. H. AUGUSTUS,
Clerk,

By June M. Lynch,
Deputy Clerk.

[Endorsed]: No. 4139-BH. Gavin vs. USA. Plfs. Exhibit D. Filed Jul. 31, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

Explanation of deductions
claimed on Lines 8 and 16

1. NAME OF PROPERTY

Explanation of deductions claimed in Column 8.....

1. DESCRIPTION OF PROPERTY

[illegible]

1. ONLAYMENTS ON BUCKSTONES

SCHEDULE E—INCOME FROM DIVIDENDS

Chafford Pacific Wire Co.

Item 17 - \$59 contributed to St. Pauls Parish Church and \$6.00 paid to Community Chest out of total of \$65.00 is undistributable
by me. Total receipts \$67.00

1. Keep no fragments
of buildings, date material
of which constructed.

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 10

1. Kind of Property	2. Date Acquired	3. Cost	4. Depreciation Taken	5. Depreciable Allowable Basis Remaining	6. Depreciation and Salvage Value	7. Disposition
		\$	\$	\$	\$	\$

(Plaintiff's Exhibit E)

* * * * *

[Endorsed]: No. 4139-BH-Civ. Gavin vs. USA.
Plfs. Exhibit E. Filed Jul. 31, 1945. Edmund L. Smith,
Clerk, by MEW, Deputy Clerk.

[Endorsed]: No. 11251. United States Circuit Court
of Appeals for the Ninth Circuit. United States of
America, Appellant, vs. Constance May Gavin, Appellee.
Transcript of Record. Upon Appeal From the District
Court of the United States for the Southern District of
California, Central Division.

Filed February 12, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11251

UNITED STATES OF AMERICA,

Appellant,

v.

CONSTANCE MAY GAVIN,

Appellee.

APPELLANT'S STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

To Constance May Gavin and Leslie J. Heap, her attorney:

You, and Each of You, will please take notice under the provisions of Rule 75 of the Rules of Civil Procedure for the United States District Court, that the appellant intends to rely upon the following points in the appeal of the above-entitled case.

I.

The Court erred in drawing its Conclusion of Law Numbered I for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

II.

The Court erred in drawing its Conclusion of Law Numbered I by failing therein to conclude that the value of the property received by the plaintiff in the compromise settlement of her litigation for a share of the

Estate of James L. Flood, Deceased, constituted taxable income to her, for the taxable year 1934.

III.

The Court erred in drawing its Conclusion of Law Numbered II for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

IV.

The Court erred in drawing its Conclusion of Law Numbered II by failing therein to conclude that said tax of \$22,373.66 and interest thereon in the sum of \$4,997.88 paid by plaintiff to the defendant during the year 1938 was legally, correctly and properly assessed and collected.

V.

The Court erred in drawing its Conclusion of Law Numbered III for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

VI.

The Court erred in drawing its Conclusion of Law Numbered III by failing therein to conclude and hold that the plaintiff had not overpaid her income taxes for the year 1934 and that nothing was due or owing the plaintiff from the defendant.

VII.

The Court erred in drawing its Conclusion of Law Numbered IV for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

VIII.

The Court erred in drawing its Conclusion of Law Numbered IV by failing therein to conclude and hold that the plaintiff was entitled to recover nothing from the defendant.

IX.

The Court erred in drawing its Conclusion of Law Numbered V for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

X.

The Court erred in drawing its Conclusion of Law Numbered V by failing therein to conclude and hold that the defendant was entitled to have and recover its costs from the plaintiff.

XI.

The Court erred in drawing its Conclusion of Law Numbered VI for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

XII.

The Court erred in drawing its Conclusion of Law Numbered VI by failing therein to conclude and hold that plaintiff should recover nothing by her action, but that the defendant should recover judgment from the plaintiff for its costs.

XIII.

The Court erred in giving and entering judgment for the plaintiff in that the record, pleadings, evidence and

the facts found by the Court required that judgment be rendered in favor of the defendant herein for its costs.

Dated: this 21 day of January, 1946.

CHARLES H. CARR—E.H.

United States Attorney

E. H. MITCHELL—E.H.

Asst. U. S. Attorney

GEORGE M. BRYANT—E.H.

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Bureau of Internal Revenue

Attorneys for Appellant.

Received a copy of the above Appellant's Statement of Points on January 23, 1946. Leslie L. Heap, Attorneys for Appellee.

[Endorsed]: Filed Feb. 14, 1946. Paul P. O'Brien, Clerk.

No. 11251

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CONSTANCE MAY GAVIN,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

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FILED

MAY 21 1936

PAUL H. O'BRIEN,
CLERK

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No. 11251
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CONSTANCE MAY GAVIN,

Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The memorandum opinion of the court below is reported in 63 F. Supp. 425. [R. 29-31.]

Jurisdiction.

This appeal involves income taxes and interest thereon for 1934 in the aggregate amount of \$27,371.54. [R. 2-11.] This amount was paid in four installments, on September 3, October 3, November 3 and December 2, 1938. [R. 4-5, 13, 28.] A claim for refund was filed on May 9, 1941 [R. 7-10], and rejected on January 6, 1943. [R. 11, 28.] On January 2, 1945, and within the time provided in Section 3772 of the Internal Revenue Code, the taxpayer brought an action in the District Court for the recovery of the taxes and interest paid. [R. 2-11.] The jurisdiction was conferred on the District Court by

Section 24, Twentieth, of the Judicial Code. Judgment for the taxpayer was entered on August 20, 1945 [R. 38-39], and an amended judgment for the taxpayer was entered on October 4, 1945, pursuant to stipulation. [R. 39-42.] Within three months thereafter, and on November 19, 1945, a notice of appeal was filed [R. 42], pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

Question Presented.

Whether the amount received by the taxpayer in compromise of her claim to be the illegitimate child and an heir to the estate of one Flood is exempted from taxable income as "property acquired by gift, bequest, devise, or inheritance" within the meaning of Section 22(b)(3) of the Revenue Act of 1934.

Statutes Involved.

The applicable statutes are set forth in the Appendix, *infra*, pp. 1-3.

Statement.

The facts established by stipulation between the parties, by the findings of fact of the court below and the admissions of the answer are these [R. 24-28, 32-36, 12-14]:

James L. Flood died testate in San Mateo County, California, on or about February 15, 1926. His last will was admitted to probate by the Superior Court of California for that county on March 11, 1926. [R. 33, 122-158.]

On March 13, 1927, the appellee (hereinafter called the "taxpayer") filed a petition for partial distribution in the court probating Flood's will, claiming that she was the illegitimate daughter, and, as such, was entitled to two-

ninths of his estate as a pretermitted heir. [R. 33-34.] A trial on the matters set forth in her petition was had before a jury and the trial court directed a verdict against the taxpayer and in favor of the estate in August, 1931. [R. 34.] An appeal was taken from the order directing a verdict against her. On April 18, 1933, the Supreme Court of California reversed the decision against the taxpayer and remanded the case for new trial, ruling that "there was competent evidence of sufficient substantiality, in support of the elements of legitimation, to necessitate the submission of the case to the jury." [R. 34, 78, 59-85.] *Estate of Flood*, 217 Cal. 763, 21 P. (2d) 579. Subsequent to that decision and before any further proceedings in the probate court, the taxpayer's claim was settled under written agreement, dated February 28, 1934, by which she received two-thirds of the amount of her claim. [R. 34.] The pertinent portions of the agreement are as follows [R. 86-94]:

This Agreement made by Constance May Gavin, wife of John P. Gavin, the first party, with Maud Lee Flood, as Trustee under the Trusts created by paragraph "Third" of the Will of James L. Flood, deceased, on file and of record in the office of the Clerk of the Superior Court for San Mateo County, California, and Maud Lee Flood, individually, Mary Emma Flood Stebbins, wife of Theodore E. Stebbins, and James Flood, second parties,

* * * * *

4. Said James L. Flood left him surviving his widow, Maud Lee Flood, and two children and no others, namely, a son, James Flood, and a daughter, Mary Emma Flood (now Stebbins). Said James L. Flood left no descendants him surviving except his said son and his said daughter. Said James L. Flood

did not leave him surviving any other child by blood, adoption or otherwise, but left as his only heirs at law his said widow, Maud Lee Flood and his said two children above named, his daughter, Mary Emma Flood (now Stebbins) and his son, James Flood;

5. * * * There is no descendant of the said James L. Flood now living except the said Mary Emma Flood Stebbins, the said James Flood, and the said James Flood Stebbins;

* * * * *

8. On March 15, 1927, the first party, Constance May Gavin, filed in the said Superior Court for San Mateo County an application and/or petition for partial distribution to her of a portion of said estate, claiming to be the illegitimate daughter of James L. Flood, and a pretermitted heir at law, and as such entitled to two-ninths of his estate. Said proceeding continued pending in the Superior Court for the County of San Mateo until the 7th day of August, 1931, on which day a judgment was entered that she was not the daughter of James L. Flood, whereupon an appeal was taken to the Supreme Court of California, which on the 18th day of April, 1933, reversed said Judgment and ordered the cause remanded to the Superior Court for San Mateo County for a new trial. A remittitur from said Supreme Court following said judgment was filed in the Superior Court of San Mateo County on the 20th day of May, 1933;

Since said last named day the said application and/or petition of the first party, Constance May Gavin, for partial distribution has continued and is now pending in the Superior Court for San Mateo County.

Said application and/or petition of the first party, Constance May Gavin, is at issue upon the issues raised by (a) her Second Amended Petition for Partial Distribution filed herein May 25, 1931; and (b) the Answer thereto filed herein May 25, 1931, by the following legatees and devisees under the will of said decedent, James L. Flood, and the following beneficiaries of legacies and devises in trust created in and by said will, to wit: * * *.

9. None of the parties of the second part, nor any of the beneficiaries of the trust created by Paragraph Third of the Will of said decedent, nor any of the legatees or devisees named in or taking under the will of said deceased, nor any of the respondents named above, recognizes or has ever recognized the validity of the claim thus put forward by the first party, and all of them have heretofore continuously denied and now deny that she is the daughter of the said James L. Flood, deceased.

10. Nevertheless the second parties do not desire to carry on the litigation and have arranged a compromise thereof with the first party whereunder the second parties will transfer, assign and set over to the said first party and her transferees and assigns certain interests to which the second parties are entitled under the will of said deceased as follows:

- (a) The said Maud Lee Flood, as trustee of the trusts created by Paragraph Third of the will, is to set over and transfer to the said first party, and/or her assigns, 5896 shares of the capital stock of the Flood Realty Company, a corporation organized under the laws of the State of California.

(b) Said Maud Lee Flood, Mary Emma Flood Stebbins, and James Flood, are to set over and assign to said first party, and/or her assigns,

[after which there were listed certain securities, real property and cash]

In addition, the following legatees have abated a portion of the legacies given to them in the will (and interest), and as a result of said abatement \$20,000. is to be paid to said first party which comes from:

[naming two religious institutions and five orphanages]

In addition to the foregoing, said Maud Lee Flood, Mary Emma Flood Stebbins, and James Flood are to pay to said first party and/or her assigns, the sum of \$100,000. out of their own funds and not distributable out of the estate of said deceased, and are to make and agreement contemporaneously with the delivery by the first party of this agreement in respect of property belonging to the said estate not now known or discovered but which may later become known or discovered.

Now, Therefore, the first party, in consideration of the premises and of the payments and transfers aforesaid, does hereby

(1) Acknowledge receipt of the payments of the aforesaid sums of money and transfer to her, and/or her assigns, of the property above listed; and the writing dealing with property belonging to the estate not now known or discovered, which is mentioned above.

(2) Promise, covenant and agree with the said second parties, and each of them, their devisees, lega-

tees, successors in interest in estate and assigns, that she, the first party, Constance May Gavin, will never hereafter assert that she is the daughter of James L. Flood, nor claim any right, title or interest in or to his estate, or any part thereof, as an heir at law or child of said James L. Flood, nor ever assert any right, title or interest in any property derived by the second parties, or any of them, their successors, heirs, legatees or assigns, by, through or under the will of James L. Flood, deceased, except such property as she has received or may receive by transfer from the second parties as hereinabove stated, (or under the above mentioned agreement relating to property belonging to the said estate not now known or discovered) whether said property consists of the identical property derived by said second parties, or any of them, from the estate of said James L. Flood, deceased, or from rents, issues or profits thereof, or by the sale of any part of the same, and/or the reinvestment of the proceeds of such sale.

(3) Further covenant that she, the first party, Constance May Gavin, will not at any time assert or claim any relationship whatever to the second parties, or any of them, or make any claim against any person whomsoever, whether such person be one of the parties of the second part or the descendants of any of them, or otherwise related to them, (and whether such persons be now or later born) by reason of or based upon the claim or an assertion that she, the first party, Constance May Gavin, was the daughter of James L. Flood, or that she had any right of inheritance in the estates of any of the second parties, or of any other person or persons whomsoever now living or hereafter to be born upon the grown or predicated upon the assertion that she is or was the daughter of James L. Flood.

(4) Agree for herself and for her heirs, successors in interest, and assigns, to warrant and defend the title of the property of the second parties, their heirs, devisees, legatees, successors and assigns against all claim to said property or any thereof, or any part or parcel thereof, to be made by her, or by any person claiming under her, and the first party agrees on her own behalf and on behalf of her heirs, successors in interest, legatees and *and* devises, that neither she nor any of them, shall or will in any manner, or to any extent, set up or claim any right to participate or take part in the administration of the estate or estates of any person or persons whomsoever now or hereafter born based upon the claim or assertion that she is or was the daughter of James L. Flood.

In Witness Whereof, the first party has hereunto set her hand at the City and County of San Francisco, State of California, this 28th day of February, 1934.

CONSTANCE MAY GAVIN.

In accord with her agreement, taxpayer allowed her petition for partial distribution to come on for hearing without contest on February 28, 1934. The taxpayer consented to the use of the settlement agreement for the purpose of supporting the findings of fact, conclusions of law and judgment of the probate court. [R. 35.]

On February 28, 1934, the probate court entered the following, pertinent excerpts from which are quoted:

Minutes [R. 95-96]:

The trial and hearing on the petition for partial distribution of the estate of the above named deceased and hearing on the settlement of the second, third, fourth and final account and petition for final distribution of said estate came regularly on this day, * * *.

* * * and the evidence being closed, said matter was submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein,

It is ordered that the petition of Constance May Gavin for partial distribution of said estate be and the same is hereby denied.

* * * * *

It is ordered that the second, third, and fourth and final accounts of executor be and the same are hereby settled and allowed as presented and final distribution of estate is hereby made as prayed for.

Decision: Findings of Fact and Conclusions of Law [R. 97, 98, 100-101]:

The above mentioned petition of Constance May Gavin for partial distribution (hereinafter for convenience sometimes called the petitioner) in the above entitled estate came on this day to be tried upon the issues raised by (a) her Second Amended Petition for Partial Distribution filed herein May 25, 1931; and (b) the Answer thereto filed herein May 25, 1931, by the following legatees and devisees under the will of the above named decedent named therein and the following beneficiaries of legacies and devises in trust created in and by said will, to-wit:
* * *

Evidence was offered and received in respect of and relevant to the issues created by said second amended petition and answer thereto, and thereupon the said second amended petition for partial distribution was submitted to the court for decision.

* * * * *

FINDINGS OF FACT.

* * * * *

James L. Flood was not and is not the father of said petitioner, Constance May Gavin; * * *

* * * * *

The only living descendants of said James L. Flood are his daughter, the said Mary Emma Flood Stebbins, his son, the said James Flood, and his grandson, the said James Flood Stebbins, born of the marriage of Theodore Ellis Stebbins and Mary Emma Flood, as aforesaid.

CONCLUSIONS OF LAW.

* * * petitioner, Constance May Gavin is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood; (b) that petitioner did not succeed to any part or portion of his estate; (c) that the petitioner take nothing by her said Second Amended Petition nor her application for partial distribution; * * *.

Judgment [R. 103]:

It Is Hereby Ordered, Adjudged and Decreed as follows:

(1) Petitioner, Constance May Gavin, is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood;

(2) Petitioner, Constance May Gavin, did not succeed to any part or portion of the estate of James L. Flood, deceased.

(3) Petitioner, Constance May Gavin, take nothing by her Second Amended Petition nor by her application for partial distribution.

Decree of Final Distribution [R. 108, 113-114]:

Said application and/or petition of Constance May Gavin for partial distribution continued pending in this Court from the 20th day of May, 1933, to this date, when it was tried by the Court without a jury (a jury having been waived) and resulted in the "Decision: Findings of Fact and Conclusions of Law," and also in the "Judgment" which are on file herein and are final. In and by said judgment, among other things, it is ordered, adjudged and decreed as follows:

(a) Petitioner, Constance May Gavin, is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood;

(b) Petitioner, Constance May Gavin, did not succeed to any part or portion of the estate of James L. Flood, deceased;

(c) Petitioner, Constance May Gavin, take nothing by her second amended petition or by her application for partial distribution;

* * * * *

(17) Said Maud Lee Flood, as such trustee [of the trust created in paragraph "Third" of Flood's will], consents to the distribution of 5896 shares of the capital stock of the Flood Realty Company which would otherwise be distributable to her as trustee, to the persons and in the number of shares below named,

and requests the court to make distribution accordingly:

To Constance May Gavin	2,948 shares Flood Realty Company
To Carmelita Aureguy	1,474 shares Flood Realty Company
To Maxwell McNutt	700 shares Flood Realty Company
To John J. Taafe, and Tressie G. Taaffe, his wife, as Joint Tenants	700 shares Flood Realty Company
To Albert Mansfield	74 shares Flood Realty Company
	<hr/>
	5,896
	==

(18) Maud Lee Flood, individually, Mary Emma Flood Stebbins and James Flood, hereby consent to distribution out of property to which they would be otherwise entitled, and request the Court to make distribution as follows:

(a) To Constance May Gavin the following shares of stock in corporations organized and existing under the laws of the State of California:

[specifying certain securities]

(b) To Constance May Gavin the sum of \$20,000.00 out of the legacies given by paragraph "Sec-

ond” of the Will and the abatement made by the legatees therein named;

(c) To Constance May Gavin an undivided 2/27ths interest in all of the lands situate in the Counties of Mendocino and Marin which are set forth and described in Schedules A and B attached to this decree;

(d) To John J. Taaffe an undivided 2/27ths interest in all of the lands situate in the Counties of Mendocino and Marin which are set forth and described in Schedules A and B attached to this decree;

In 1934 the taxpayer realized cash and securities, as a result of the above-mentioned settlement, of the value of \$206,974.43. [R. 4, 13.] In her income tax return for that year she reported 40% of that amount, or \$82,789.77, as capital gain and paid income tax thereon in the amount of \$22,373.66, together with interest thereon. [R. 35-36, 159-160.] A claim for refund of this amount was filed on May 9, 1941, and rejected on January 6, 1943. [R. 36.]

The court below entered the conclusion of law “that none of the value of the property received by the plaintiff in the said compromise settlement of her said litigation for a share of said estate constituted taxable income to her”, and entered judgment for the taxpayer in the amount of income taxes and interest thereon that she had paid for 1934. [R. 36, 41-43.]

Statement of Points to Be Urged.

The points to be urged are set forth in detail in the "Appellant's Statement of Points to be Relied upon on Appeal." [R. 162-165.] In essence, the Government asserts that the court below erred in entering the conclusion of law that the amount realized by the taxpayer in the compromise settlement of her claim to be an heir to the estate of Flood did not constitute taxable income to her.

Summary of Argument.

In order to claim an exemption from taxable income for the amount realized on the taxpayer's settlement of her claim to be an heir to the estate of Flood as property acquired by "bequest, devise, or inheritance" under the provisions of Section 22(b)(3) of the Revenue Act of 1934, the taxpayer must have proved that she received such amount as an heir and that such amount was paid to her from the estate of Flood.

The court below erred in granting the exemption (a) because there is no finding that she was an heir and received the amount in question as such; (b) because the probate court administering Flood's estate found as a fact that she was not an heir; and (c) because the amount she realized was not acquired from the decedent through his estate, but was acquired by contract between the taxpayer and certain beneficiaries of the estate under which she received approximately one-half of that amount from their own private funds and the balance from an assignment of a part of their share in the estate.

ARGUMENT.

The Amount Realized by the Taxpayer by Settlement of Her Claim to Be an Heir Was Not Acquired by "Inheritance."

Section 22(b)(3) of the Revenue Act of 1934 [Appendix, *infra*], which enumerates the "exclusions from gross income", provides, *inter alia*, that "the value of property acquired by gift, bequest, devise, or inheritance" "shall not be included in gross income and shall be exempt from taxation under this title."

The taxpayer contends, and the court below held, that the \$206,974.43 which she realized under the settlement agreement came within this exemption. This exemption is to be strictly construed and the taxpayer claiming its benefits has the burden of proving that she clearly comes within its terms. *Parrott v. Commissioner*, 30 F. (2d) 792 (C. C. A. 9th); *Riverdale Co-op. Creamery Ass'n v. Commissioner*, 48 F. (2d) 711 (C. C. A. 9th).

The taxpayer has not asserted that her acquisition was by "gift", "bequest", or "devise." Necessarily, it must be asserted that the property was acquired by "inheritance" within the meaning of Section 22(b)(3) of the Revenue Act of 1934.

The term "inheritance" in this exemption was interpreted in *Lyeth v. Hoey*, 305 U. S. 188, 194-195, as follows:

Second. In exempting from the income tax the value of property acquired by "bequest, devise, or inheritance," Congress used comprehensive terms embracing all acquisitions in the devolution of a decedent's estate. For the word "descent," as used in the earlier acts, Congress substituted the word "inheritance" in the 1926 Act and the subsequent revenue

acts as "more appropriately including both real and personal property." Thus the acquisition by succession to a decedent's estate whether real or personal was embraced in the exemption. Further, by the "estate tax," Congress has imposed a tax upon the transfer of the entire net estate of every person dying after September 8, 1916, allowing such exemptions as it sees fit in arriving at the net estate. Congress has not indicated any intention to tax again the value of the property which legatees, devisees or heirs receive from the decedent's estate.

In order to be entitled to the exemption claimed, the taxpayer must have proved that the amount she realized was a transfer from the decedent by reason of his death and that the amount realized was paid to her as an heir.

The Government maintains that the judgment of the court below cannot be sustained because, first, there is no finding that the amount the taxpayer received as a result of the compromise of her claim to be an heir was paid to her as an heir; secondly, the findings and undisputed facts establish that the amount she received was not paid to her as an heir; and thirdly, the amount realized did not come from the decedent's estate.

A. THE CONSIDERATION GIVEN TO THE TAXPAYER UNDER THE SETTLEMENT AGREEMENT WAS NOT PAID TO HER AS AN HEIR.

The taxpayer is not entitled to the claimed exemption because the amount realized under the settlement agreement was not paid to her as an heir, but in compromise of *her claim to be an heir* of Flood's estate.

Reduced to its essentials, the taxpayer entered into an agreement under which she received certain property and

money for renouncing *her claim to be an heir* and her share of the estate *if* she was an heir.¹ As such the amount realized was the fruit of a private contract and was not received by intestate succession. The importance of this distinction is evident in the leading case on this question, *Lyeth v. Hoey*, *supra*, cited by the court below and relied on so strongly by the taxpayer. In that case Lyeth, the taxpayer, was an heir and legatee of a deceased grandmother. When her will was offered for probate, the heirs objected to the probate of the will on the ground of the lack of testamentary capacity, among other grounds. An agreement was entered into between the heirs, legatees, devisees, executors and the Attorney General of Massachusetts, whereby the taxpayer, together with the other heirs, in compromise of their claim, received a portion of the residuary estate. The Supreme Court held that the amount received by Lyeth under that settlement agreement was exempt from income tax as property acquired by "bequest, devise, or inheritance" within Section 22(b)(3) of the Revenue Act of 1932, which is the counterpart of the exemption involved in this case. The Court made these pertinent observations (pp. 195-197):

Petitioner was concededly an heir of his grandmother under the Massachusetts statute. It was by virtue of that heirship that he opposed probate of her alleged will which constituted an obstacle to the enforcement of his right. Save as heir he had no standing. Seeking to remove that obstacle, he asserted that the will was invalid because of want of testamentary

¹There can be little doubt that the settlement agreement between the taxpayer and the beneficiaries of the estate was a valid contract. See *Wilson v. Davis*, 11 Cal. (2d) 761, 81 P. (2d) 971; *Bacon v. Kessel*, 31 Cal. App. (2d) 245, 87 P. (2d) 857. See also *Estate of Rossi*, 169 Cal. 148, 146 Pac. 430.

capacity and undue influence. * * * It was in that situation, facing a trial of the issue of the validity of the will, that the compromise was made by which *the heirs, including the petitioner*, were to receive certain portions of the decedent's estate.

There is no question that petitioner obtained that portion, upon the value of which he is sought to be taxed, *because of his standing as an heir and of his claim in that capacity*. It does not seem to be questioned that if the contest had been fought to a finish and petitioner had succeeded, the property which he would have received would have been exempt under the federal act. Nor is it questioned that if in any appropriate proceeding, instituted by him as heir, he had recovered judgment for a part of the estate, that part would have been acquired by inheritance within the meaning of the act. We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption. *It does so, because it disregards the heirship which underlay the compromise, the status which commanded that agreement and was recognized by it.*

* * * That portion he obtained because of his heirship and to that extent he took in spite of the will and as in case of intestacy. * * *

We are not convinced by the argument that petitioner had but "the expectations" of an heir and realized on a "bargaining position". *He was heir in fact*. Whether he would receive any property in that capacity depended upon the validity of his ancestor's will and the extent to which it would dispose of his ancestor's estate. When, by compromise and the decree enforcing it, that disposition was limited, *what*

he got from the estate came to him because he was heir, the compromise serving to remove *pro tanto* the impediment to his inheritance. We are of the opinion that the exemption applies. (Italics original.)

The salient fact, repeatedly emphasized in the opinion in *Lyeth v. Hoey, supra*, as indicated by the portion quoted, is that the taxpayer there involved entered into a compromise agreement in the undisputed status of an heir. See *Helvering v. Safe Deposit Co.*, 316 U. S. 56. That fact is not present here. The taxpayer in this case has not been established as an heir; that was the issue of fact which was so vigorously disputed by the established heirs [R. 89]; that was the issue resolved against the taxpayer on the first trial by the probate court on a directed verdict [R. 34]; that was the issue which the taxpayer conceded in the settlement agreement [R. 86-94]; that was the issue determined against the taxpayer by the probate court on the second trial, if only by reason of the settlement agreement [R. 98].

The Government is not urging any formal distinction between the amount claimed by an heir through intestacy and the amount received by an heir by compromise, as in *Lyeth v. Hoey, supra*. The Government is asserting the distinction between the amount received by an heir and one who claims to be an heir but never establishes her status as such. Obviously, if the taxpayer had judicially established her claim to be an heir, her distributive share would constitute an "inheritance." Instead, she chose to forego her claim to be an heir and her chances of a favorable decision, which had speculative value only, for the payment of \$206,974.43.

The court below was under the erroneous impression that the Government was endeavoring to go back of the

compromise to try the issue of heirship. On the contrary, the compromise is being relied on. Any such issue would necessarily have to be raised by the taxpayer. It was her burden to prove that she was an heir and that the amount she received in compromise was paid to her in that status. No such finding was made by the court below. The only finding made on this issue was the finding of the probate court that she was not the daughter of Flood. [R. 98, 100.] While this finding may have been made as a result of the settlement, it is just as conclusive between the parties as one entered upon contest and trial. *Moore v. Schneider*, 196 Cal. 380, 389, 238 Pac. 81; *Nielsen v. Emerson*, 119 Cal. App. 214, 218, 6 P. (2d) 281.

In any event, the evidence establishes that the amount realized by the taxpayer was not paid to her exclusively as partial compensation for her claimed share of the estate. While the parties stipulated, and the court below found, that the settlement was between the taxpayer and "representatives of said estate" [R. 34], the parties to the written agreement were the taxpayer, Flood's widow as a trustee of a trust created by his will,² Flood's daughter and Flood's son. In addition to the reduction of the amount of the taxpayer's claim, the agreement made detailed and elaborate provisions whereby the taxpayer renounced not only her property claims against the estate, but stipulated that she was not the daughter of Flood and that she would never thereafter claim to be his daughter. These concessions were undoubtedly a material part of the consideration for which Flood's wife and children were willing to pay and did pay under the agreement. Cf. *Smithsonian Institution v. Meech*, 169 U. S. 398, 415. The portion of

²While Flood's widow was also executrix of his will, she was not designated as such in the settlement agreement.

the consideration received by the taxpayer for these concessions is distinct from any other portion attributable to intestate succession. *Cf. Alphonso E. Bell Corp. v. Commissioner*, 145 F. (2d) 157 (C. C. A. 9th).

The court below was apparently of the opinion that a decision in favor of the Government would discourage the compromise of claims against estates such as the taxpayer's herein. That possibility or probability cannot determine whether income tax liability exists.

The distinguishing facts of *Lyeth v. Hoey*, *supra*, are also present in other decisions heretofore cited by the taxpayer and relied on by the court below. For example, in *Magruder v. Segebade*, 94 F. (2d) 177 (C. C. A. 4th), the taxpayers there involved, who were legatees under one will, entered into a compromise agreement with the legatees of a subsequent will, under which the taxpayers received a portion of the latter's distributive share under the second will in consideration of the taxpayer's not contesting that will. The court ruled that the amount realized under this agreement was not taxable income. It is to be noted that the taxpayers in that case made their claim and entered into the settlement in the undisputed status of legatees of an earlier will. The same distinction is present in *Keller v. Commissioner*, 41 B. T. A. 478; *Rhodes v. Commissioner*, decided September 16, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,301); *Goldman v. Commissioner*, decided July 28, 1943 (1943 P-H T. C. Memorandum Decisions, par. 43,360).

The decision in *Estate of Howard v. Commissioner*, decided December 9, 1943 (1943 P-H T. C. Memorandum Decisions, par. 43,503), is authority for the Government's position herein, rather than the taxpayer's. The estate there involved settled the judgment upholding the claim in

favor of a person claiming to be the illegitimate child and pretermitted heir, pending the estate's appeal from that judgment. The Tax Court disallowed the claim for a deduction of the amount paid in settlement as an administration expense in computing the estate tax, pointing out the fact that there had been a verdict entered that the claimant against the estate was the daughter of the decedent (which is contrary to the facts herein), and that the amount paid to her was a "distribution from the estate" and not the payment of "costs or expenses." In any event, the question there involved was the interpretation of a statutory deduction in computing estate tax, and not the exemption from income tax involved herein. See *Robbins v. Commissioner*, 111 F. (2d) 828 (C. C. A. 1st). Also, the settlement there involved was made directly with the executors, a distinction elaborated in the discussion following.

B. THE AMOUNT REALIZED BY THE TAXPAYER UNDER THE SETTLEMENT AGREEMENT DID NOT COME FROM THE ESTATE.

It is plain, under *Lyeth v. Hoey, supra*, that in order to be entitled to the claimed exemption it must be shown that the amount alleged to have been acquired by "inheritance" must have in fact come from the decedent through his estate.

The second basic reason why the taxpayer is not entitled to the claimed exemption is that the amount she realized did not come from the decedent through his estate. This is established in fact and in law to the extent of \$100,000, at least, of the total amount realized by the taxpayer. The settlement agreement expressly provided [R. 92]:

In addition to the foregoing, said Maud Lee Flood, Mary Emma Flood Stebbins, and James Flood are to pay to said first party [the taxpayer] and/or her as-

signs, the sum of \$100,000. *out of their own funds and not distributable out of the estate of said deceased*, and are to make and agreement contemporaneously with the delivery by the first party of this agreement in respect of property belonging to the said estate not now known or discovered but which may later become known or discovered. (Italics original.)

It is submitted that the \$100,000 realized by the taxpayer under this portion of the agreement was not acquired by “inheritance” and is taxable as income to her.

The Government maintains that the balance of the amount realized by the taxpayer also was not derived from the estate, but from the property of the beneficiaries of the estate. The written settlement agreement is not between the taxpayer and the executrix of the estate. The agreement was made between the taxpayer and the trustee and two of the beneficiaries of a trust created by the decedent’s will. As such we maintain that the taxpayer’s agreement was a contract between persons who were legatees and beneficiaries of the estate whereby, for valuable consideration, they assigned a portion of *their* inheritance to the taxpayer. This is not a conclusion, but the express agreement of the parties stated in the following language [R. 90]:

Nevertheless the second parties do not desire to carry on the litigation and have arranged a compromise thereof with the first party [the taxpayer] whereunder the second parties will *transfer, assign and set over* to the said first party and her transferees and assigns certain interests *to which the second par-*

ties are entitled under the will of said deceased as follows: (Italics original)

after which there were listed certain stocks consisting of part or all of the corpus of the above-mentioned trust, certain other securities, certain realty owned by the decedent and [R. 91]—

An undivided 4/27ths of any unexpended balance *which may be received by them* from the estate, after all charges and expenses have been paid, which 4/27ths is estimated to amount to between \$5,000. and \$7,500. (Italics original.)

In addition, the taxpayer was to receive \$20,000 out of the legacies to two religious and five charitable institutions which were abated to that extent.

It is evident that the settlement constituted a private agreement between certain of the beneficiaries of the estate and the taxpayer, whereby the beneficiaries delivered to the taxpayer certain moneys out of their own funds, and assigned a portion of their share of the estate which was distributable to them. As such it is clearly the fruit of a private contract not realized by descent and distribution from the estate. It is to be noted that the amounts paid to the taxpayer were not made out of the legacies in the will under the provisions of Section 91 of the Probate Code of California [Appendix, *infra*], which controls the source of payment of the distributive share of a pretermitted heir, but by private contract.

The fact that the probate court took cognizance of the settlement and, so far as it was able, carried it out does not detract from the fact that the estate was not a party to the agreement and the fact that the probate court was simply recognizing an assignment of a portion of the estate.

The final decree of distribution expressly recognized this to be true as is evident from the following language [R. 113-114]:

Said Maud Lee Flood, as such trustee, consents to the distribution of 5896 shares of the capital stock of the Flood Realty Company which would otherwise be distributable to her as trustee, to the persons and in the number of shares below named, *and requests the court to make distribution accordingly:*

To Constance May Gavin	2,948 shares Flood Realty Company
To Carmelita Aureguy	1,474 shares Flood Realty Company
To Maxwell McNutt	700 shares Flood Realty Company
To John J. Taaffe, and Tressie G. Taaffe, his wife, as Joint Ten- ants	700 shares Flood Realty Company
To Albert Mansfield	74 shares Flood Realty Company

—
5,896
==

Maud Lee Flood, individually, Mary Emma Flood Stebbins and James Flood, hereby consent to distribution out of property to which they would be otherwise entitled, *and request the Court to make distribution as follows:*

* * * * *

(Italics original.)

Conclusion.

The Government respectfully submits that the sum of \$206,974.43 realized by the taxpayer under the settlement agreement in question was not acquired by "gift, bequest, devise, or inheritance" within the meaning of Section 22 (b) (3) of the Revenue Act of 1934, and is therefore taxable as income to her. Hence, the decision of the court below should be reversed.

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May, 1946.

APPENDIX.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 21. NET INCOME.

“Net income” means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(a) *General Definition.*—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or

exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * * * *

Probate Code of California (1931), Div. I, c. IV:

§90. *Rights of children and grandchildren.* When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement,

and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate.

§91. *Sources of unmentioned child's share.* The share of the estate which is assigned to a child or issue omitted in a will, as hereinbefore mentioned, must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

No. 11251

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CONSTANCE MAY GAVIN,

Appellee.

BRIEF FOR THE APPELLEE.

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No. 11251

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CONSTANCE MAY GAVIN,

Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

The memorandum opinion of the Court below is reported in 63 F. Supp. 425. [R. 29-31.]

Jurisdiction.

Appellant's statement *re* jurisdiction is substantially correct. The judgment appealed from was for the refund of 1934 income taxes and interest thereon. [R. 38-42.] Such taxes were paid in four installments in 1938. [R. 4, 5, 13, 28, 35, 36.] A claim for refund was filed May 9, 1941 [R. 7-10, 14, 28, 36] and the same was disallowed by the Commissioner of Internal Revenue on January 6, 1943. [R. 6, 14, 28, 36.] Appellee filed the original action in the District Court on January 2, 1945 within time provided in Section 3772 of the Internal Revenue Code. [R.

2-11.] The said District Court gave judgment to Appellee and the same was entered on August 20, 1945 and an amended judgment, by stipulation, was entered October 4, 1945. [R. 38-42.] The government filed notice of appeal therefrom on or about November 19, 1945 pursuant to Section 128(a) of the Judicial Code, as amended. [R. 42.] Jurisdiction of the original action was conferred on the United States District Court by paragraph 20 of Section 24 of the Judicial Code. [R. 3, 12.]

Question Presented.

Whether the value of the settlement received by Appellee in compromise of her litigation against the Flood estate and the representatives thereof for a pretermitted daughter's share (2/9ths) of said estate constituted taxable income to the recipient?

Statutes Involved.

The applicable statutes are set forth in the Appendix, *infra*, pp. 1 to 4.

Statement of Facts.

There is no dispute about the facts. Most of them are admitted by the government's answer. The others are covered by a Stipulation of Facts. [R. 24-28.] The Statement in the Appellant's brief is not a fair statement. It is very incomplete and very misleading. For the most part it is merely a copy of one paper, in the nature of a release, that was signed in connection with the settlement. The true facts, as admitted by the answer or as set forth in the above mentioned stipulation and the Exhibits referred to therein, were as follows:

The Appellee, from the time she was three (3) months of age, lived in the home of James L. Flood as a member

of his family. She traveled with him as his daughter and she was raised and educated by him and otherwise recognized and treated as his daughter. [R. 65-74.]

Said James L. Flood died testate in San Mateo County, California, on or about February 15th, 1926. His last Will and Testament was admitted to probate by the Superior Court in said County on March 11, 1926 and James E. Walsh and Maud Lee Flood were appointed Executors thereof. Mr. Walsh died in 1932 and Maud Lee Flood continued as the sole Executor thereafter. She was the widow of said decedent and James Flood and Mary Emma Flood were son and daughter respectively of said decedent. Cora Jane Flood was a sister of the decedent and she died in November, 1928, during administration.

James E. Walsh and Maud Lee Flood were also trustees under the Will of said decedent and in 1931, they, as such trustees, sold 4295 shares of Flood Realty Company stock to the Flood Realty Company, and at the time of distribution of the estate said Maud Lee Flood consented to distribution of said 4295 shares to said company.

On March 13, 1927, the Appellee herein, filed in the Court probating said estate, a petition for partial distribution, claiming that she was entitled to 2/9ths of said estate as the daughter and pretermitted heir of said decedent and asking for distribution of a portion of said estate to her. A trial of said matter was had before a jury and the trial Court directed a verdict against the Appellee herein in August, 1931 and a judgment was entered against her. She appealed therefrom and on April 18th, 1933 the Supreme Court of California (in Bank) reversed said decision and remanded the cause for a new trial. The Supreme Court's opinion is reported in 217 Cal. 763 and a copy thereof is in evidence here marked Exhibit "A". [R. 59-85.]

Between May 20th, 1933 and February 28th, 1934, a compromise settlement was arranged under which the following things were to and did occur:

1. Said litigation was to be settled and terminated and it was settled and terminated on February 28, 1934, in the manner hereinafter set forth.
2. Plaintiff in said case (Appellee here) was to receive 2/3rds of the amount sought in her petition for final distribution or 4/27ths of the Estate of James L. Flood that became available for distribution and plaintiff or her assigns have in fact received that portion of said estate in kind. Appellee and her assigns received \$100,000 cash in lieu of a 4/27ths interest in the corporate stock of Rancho Santa Margarita, a corporation, and certain real property in San Francisco, California, both of which were covered by the residuary clause of the Will. [R. 120, 121, 135, 157.]
3. Plaintiff in said case (Appellee here) was to sign a certain document designated as an Agreement and deliver it to the representatives of said estate. She did so and a copy of the same is in evidence marked Exhibit "B". [R. 86-94.]
4. Petitioner in that case (Appellee here) was to permit and on February 28th, 1934, did permit her said Petition for partial distribution to come on for hearing without contest, whereupon Findings of Fact, Conclusions of Law and a Judgment disposing of said petition were entered on February 28th, 1934. A copy of the Minutes of said proceedings and copies of the said Findings of Fact, Conclusions of Law and Judgment

are in evidence marked Exhibit "C". [R. 95-104.]

5. On the same last above mentioned date, to-wit February 28, 1934 a Decree for the Final Distribution of the Estate of James L. Flood, was to be and in fact was made and entered by the same Probate Court and Judge that made the last above mentioned Findings of Fact, Conclusions of Law and Judgment. [R. 101, 104, 122.] Said Decree of Final Distribution is in evidence marked Exhibit "D". [R. 104-122.] The distributions therein provided have been made to Plaintiff and her assignees, *Eugene Aureguy*, *John J. Taaffe*, *Maxwell McNutt*, *Albert Mansfield* and *Carmelita Aureguy*.

The government claimed that the money and property so received by Appellee was subject to income tax and taxable as a gain on capital held more than 5 and less than 10 years. [R. 4, 160.] Appellee, in an effort to comply with the demands of the Revenue Department, filed an Income Tax Return on or about May 10th, 1938, which said return covered the year 1934. A copy of the same is in evidence marked Exhibit "E". [R. 159-160.]

Appellee paid the Collector of Internal Revenue the alleged income taxes and interest in the amounts and on the dates set forth in her complaint here [R. 5] and in the Findings made in this case. [R. 36.] Thereafter, she filed her claim for refund which was disallowed by the Commissioner of Internal Revenue on January 6th, 1943. This suit followed and Appellee had Judgment as set forth in the record. [R. 29-41.]

Statement of Points to Be Urged.

The District Court correctly decided this case. Appellee was and is entitled to said refund. The settlement received by her in compromise of said litigation was not income and was not taxable as such. If income, such receipts were within the exclusion of 22(b)(3) of 1934 Revenue Act. *Appendix, infra.*

Summary of Argument.

Income had been defined by the Supreme Court of the United States prior to the adoption of the Sixteenth (16th) Amendment to the United States Constitution and the word *income* was used in the Sixteenth (16th) Amendment according to the meaning of the term as previously defined. Money or property received from an estate and its representatives in settlement of litigation brought by a person to recover his or her interest in said estate is *not income* within the meaning of that term as used in the Sixteenth (16th) Amendment. *Appendix, infra.*

The settlement received by the Appellee in compromise of her said litigation was *an acquisition in devolution of a decedent's estate* and was in the nature of an *inheritance* within the *principles* enunciated by the Supreme Court in *Lyeth v. Hoey*, 305 U. S. 188. If her litigation had been carried to the bitter end, distribution to her as the pretermitted daughter would not have been taxable income. What she received in settlement is of the same character. So, why should it be taxable? Certainly she gained nothing because she took less than the amount which would have been distributed to her upon the successful conclusion of her litigation. The settlement receipts were therefore not taxable as income.

ARGUMENT.

I.

None of the Value of the Money or Property Received by Plaintiff Was Income in Any Sense.

The Government's main premise here, as shown by their brief, is that everything that a person may receive is *income* and is taxable unless the same can be specifically excluded or exempted under some exclusion or exemption provided in the Revenue Act. In our opinion, that premise is false. The Government also assumes and wants the Court to find that *Mrs. Gavin* was not an heir and was not entitled to anything because she settled her case instead of going on with the litigation. They go further and assume that if anyone claims an interest in an estate as an heir and settles the claim, the amount received is taxable income unless the person retries, in a Federal Court, the very case that he or she settled in the State Court and proves to the Government that he or she was an heir and would have won the case in the State Court. We cannot agree with this proposition. In the first place, it is ridiculous because to retry such a case in a Federal Court could not prove or disprove what the result would have been in the State Court. Furthermore, it is our opinion that none of the authorities cited or relied upon by the Government uphold or support that contention.

The Appellant's brief devotes much space to a certain statement, in the nature of a release, which was signed by Mrs. Gavin only, as though that was the only fact in the record. The truth of the matter is that that is only one of the many things that were to be done to carry out the settlement arrangement. As shown by the stipulation of facts here [R. 26] many months (May 20, 1933 to February 28, 1934) were devoted to the arrangement of that

settlement, and during that time the various details of the settlement were worked out, and the parties and their counsel (as is usually the case) orally agreed to the terms of settlement and provided that the things enumerated in our stipulation of facts here were to be done, and those things were done to carry out the settlement. [R. 26-27.] One of those things was the statement *signed only by Mrs. Gavin*. Another was the termination of the suit. Another was the Decree of Distribution. All of these were done *at the same time, in the same Court, before the same Judge*.

The Government also spends much space arguing that what Mrs. Gavin and her assignees received came from the beneficiaries under the Will and not from the estate. That argument likewise is ridiculous. Here, the Will left the estate to certain beneficiaries named therein including Maud Lee Flood as a trustee under certain trusts. *Mrs. Gavin* was not named in the Will. She was pretermitted and she sought her share as such pretermitted daughter. We should like to have the Government's counsel tell us how it would have been possible to distribute any of the estate to *Mrs. Gavin* without reducing the shares of the beneficiaries named in the Will. Most certainly, that could not be done. Accordingly, the shares of the beneficiaries were reduced, and cash was raised, in order to make distribution to Mrs. Gavin and her assignees as agreed upon in the oral settlement arrangement. Pursuant thereto Mrs. Gavin and her assignees received $\frac{4}{27}$ ths or $\frac{2}{3}$ rds of $\frac{2}{9}$ ths of said estate in kind under the Decree of Distribution; and in working out the settlement she and her assignees took \$100,000 cash in lieu of $\frac{4}{27}$ ths of the corporate stock in the Rancho Santa Margarita and certain San Francisco real estate which went to the residuary devisees and legatees. In other words, she took $\frac{4}{27}$ ths of

the estate and what she received was *an acquisition in devolution of a decedent's estate* and came to her as a result of the death of Mr. Flood and her determined effort to recover her share as his pretermitted daughter.

With reference to what is or is not income, we note that the Government insists that everything she received was taxable unless it comes within Section 22(b)(3) of the Revenue Act of 1934. *Appendix, infra*. We cannot agree with that proposition either. If what she received was *income* within the 16th Amendment of the United States Constitution, their proposition might be true, but we contend that it was *not income* at all.

We observe that Section 22(a) of the Revenue Act of 1934, *Appendix, infra*, provides that gross *income* shall include "gains or profits and income derived from any source whatever." This provision is not a definition of *income* because it includes the term to be defined. The same is true of Section 21 of the Act. *Appendix, infra*. After all it is *income* that the statute refers to and in the exclusions it is referring to exclusions from *income*. That is, you must have *income* in the first place, before the Act applies at all. We contend that what she received was *not income*, and that no case, except the case of *Kearney v. Commissioner*, 31 B. T. A. 935, and those based thereon which were later *overruled* by *Segebade v. Magruder*, C. C. A. 1938, 94 F. (2d) 177; *Lyeth v. Hoey*, 1938, 305 U. S. 188; and *Keller v. Commissioner*, 1940, 41 B. T. A. 478, acquiesced in by the Commissioner, has so held.

The settlement received by Mrs. Gavin was neither a gain nor a profit nor income. It was *capital* which she claimed she was entitled to and she sued to get it. She settled and took *less* than she was entitled to. How and on what theory can that be taxable as *income*?

We pause to point out that the following receipts have been held by the Supreme Court not to be income although not expressly exempted by the Revenue Act:

Stock Dividends, *Eisner v. Macomber*, 252 U. S. 189; *Helvering v. Griffiths*, 318 U. S. 371; Alimony, *Gould v. Gould*, 245 U. S. 151; Money subsidies granted by the Cuban Government to an Illinois Railroad to promote construction of railroads in Cuba, *Edwards v. Cuba Railroad*, 268 U. S. 628.

The Government has no right to levy an income tax except under and by reason of the Sixteenth (16th) Amendment to the United States Constitution, which reads:

“The Congress shall have power to lay and collect taxes on *incomes*, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” (Italics ours.)

Congress has not defined “*income*” but “*income*” has been defined by the United States Supreme Court on a number of occasions. That word was defined by the United States Supreme Court *before* the adoption of the Sixteenth (16th) Amendment. As that Court pointed out in *Merchants Loan and Trust Company v. Smietanka*, 255 U. S. 509, the Corporation Excise Tax Act of 1909 was *not an income tax law*, but that a definition of the word “*income*” was so necessary in its administration that in the early case of *Stratton’s Independence, Ltd. v. Howbert*, 231 U. S. 399, it was formulated as “a gain derived from capital, from labor, or from both combined.”

In *Eisner v. Macomber*, 252 U. S. 189, the Supreme Court reiterated the definition of “*income*” which had

been approved in the case of *Straton's Independence, Ltd. v. Howbert, supra*, and *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, as follows:

"Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets, * * *"

The Court in the *Merchants Loan and Trust Company* case, *supra*, further pointed out that the word "income" under all Income Tax Laws means the same as it did under the said Corporation Excise Tax Act and that that meaning has now become definitely settled by the decisions of the Supreme Court, and the Court in that case (page 519) said,

"In determining the definition of the word 'income' thus arrived at, this Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it is believed to be the *commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution.*" (Italics ours.)

In the District Court proceedings on the case at bar Appellant's counsel cited and referred to the case of *In re Owl Drug Co.* (1937), D. C. Nevada, 21 Fed. Supp. 907, 20 A. F. T. R. 729, as supporting the Government's position. We have observed that the Honorable Judge Yankwich in that case said this:

"In defining the word 'income' in tax statutes enacted under the Sixteenth Amendment to the Constitution, the criterion adopted by the courts has been 'the commonly understood meaning of the term.' *Mer-*

chants' Loan & Trust Co. v. Smietanka (1921), 255 U. S. 509, 519, 41 S. Ct. 386, 388, 65 L. Ed. 751, 15 A. L. R. 1305. This has been called the '*man on the street*' concept of what income is. Paul & Mertens, Law of Federal Income Taxation, 5.02-5.03. 'Income' is all 'gain derived from capital, from labor, or from both.' *Stratton's Independence v. Howbert* (1913) 231 U. S. 399, 415, 34 S. Ct. 136, 140, 58 L. Ed. 285. * * *'' (Italics ours.)

The Appellee did not invest her capital; she was suing to get it. The amount received by her under the compromise was not the result of an investment, but a realization of a substantial portion of the share of the estate which she was suing for as a pretermitted daughter. It was just as much so as if she had successfully completed her litigation on her petition for partial distribution of the estate. It is not possible for a person to derive a gain from capital until he has obtained possession or control of the capital.

Likewise she did not derive a gain from labor. Whatever labor was put forth was performed by her attorneys and investigators in conducting the litigation and the negotiations resulting in the compromise settlement. For that labor her attorneys and investigators received one-half of the settlement. That labor did not result in a gain to Appellee, but it did result in her realization and receipt of a portion of the share she was suing for as the decedent's pretermitted daughter. She had the legal right to contest his Will to establish her claim and she was exercising that right. It was her *standing or status in that capacity that commanded the compromise settlement*.

In *Merriman v. Commissioner*, 55 F. (2d) 879 (C. C. A. 1), it was held that a will contest is not a transaction

entered into for profit and that attorneys' fees and expenses paid by an unsuccessful contestant are not deductible losses. On page 880 the Court said:

"When the petitioner brought her suit to break her aunt's will, it was to establish her right to what she must have claimed honestly belonged to her. * * * If the litigation had proved successful, she would have received only such part of the testator's estate as justly belonged to her. That would not have been profit. The litigation was unsuccessful. Her anticipated share in the estate was denied her. It was not loss because she never possessed it. To hold that the expenses of litigation under the existing facts were a deductible loss because incurred in a transaction entered into for profit would be *straining the meaning of 'profit' beyond any ordinary or usual meaning of the word and beyond the sense in which it was used by Congress.*" (Italics ours.)

If a transaction cannot be productive of income for the purpose of deducting expenses, surely it must be likewise unproductive of income for the purpose of levying an income tax.

At this point we make the following observation: James L. Flood died in 1926. The Flood Estate was subject to Federal Estate Tax and the same was calculated and paid a long time before the settlement with Appellee in 1934. Suppose, that the Executor of the Flood Estate had, after the settlement, claimed a deduction from or refund on said Estate taxes on the theory advanced in the case of *Howard v. Commissioner*, B. T. A., Docket No. 109188 (Dec. 1943), that the amount paid to *Mrs. Gavin* on her claim was a deductible item. *Query*: Would counsel for the Government (one of whom represented the Government in the *Howard* case) have approved such item as a

deduction or for refund or would they have contended, as in the *Howard* case, that what *Mrs. Gavin* received was “by way of inheritance” and therefore not deductible? We feel certain that they would have taken exactly the same position as was taken by them in the *Howard* case, which we believe was correct.

Furthermore, in the transaction at bar, there was no gain or profit from the sale, exchange or conversion of assets. If Appellee had prosecuted her claim and litigation to a successful conclusion the amount received would not have been income, profit or gain and would not have been taxable. Likewise, if she had been unsuccessful in the litigation there would have been no income, gain or profit and there could have been no tax, nor could she have deducted any of the expense or attorney's fees under the authority of the *Merriman* case, *supra*. Still the Government contends that because she compromised the litigation she received taxable income, even though they must admit that a final decree, either for or against her, would have resulted in no tax. Such reasoning is fallacious and untenable.

Fundamentally, the compromise of a claim is not an exchange or sale which results in a profit. Here, Appellee asserted her rights as a pretermitted daughter of the decedent and claimed a property right in his estate, to-wit 2/9ths thereof. The compromise resulted in her receiving (between herself, her attorneys and her investigators) 2/3rds of said 2/9ths or 4/27ths of said estate, or 1/3rd of 2/9ths less than she was claiming and entitled to. She therefore gave up 1/3rd of her share rather than to litigate further. It is utterly ridiculous for anyone to contend that such a transaction is an exchange, sale or conversion of assets resulting in a gain or profit to her.

The common sense rule is that the *nature* of the claim itself determines whether or not the avails are income, gain or profit and it makes no difference whether or not the claim is compromised or litigated to a judgment. This rule is supported by the authorities.

Central R. R. of N. J. v. Commissioner, 79 F. (2d) 697 (C. C. A. 3rd);

Hawkins v. Commissioner, 6 B. T. A. 1023 (Acq.);

Farmers and Merchants Bank of Catlettsburg, Ky. v. Commissioner of Internal Revenue, 59 F. (2d) 912 (C. C. A. 6th);

Gould v. Gould, 245 U. S. 151.

The foregoing cases and numerous others all support the rule that it is the *nature* of the claim itself that determines whether the avails are taxable.

If the Appellant's contention should be adopted, the practical results would be intolerable because no one could compromise such a claim without making the proceeds which would otherwise be tax exempt, taxable. Under the present rates of taxation compromise settlements of litigation would virtually cease, in spite of the commendable and equitable rule that the law favors compromises.

On principle and under the authorities it appears perfectly clear to us that amounts received in such compromise settlements are *not income* and therefore not taxable as such.

The first case in which the Government taxed such amounts as income was *Kearney v. Commissioner*, 31 B. T. A. 935. That was a Board decision by one member of the Board. The theory there was that amounts received in the compromise settlement of the Will Contest was a gain "derived from capital, from labor, or from both com-

bined," in that the taxpayer exchanged or sold a right or claim, which cost him nothing for that which he received, and that the amount received was therefore profit or gain. That case was decided in 1934 and was not appealed by the taxpayer.

The Government relied upon that decision in taxing *Lyeth* in *Lyeth v. Hoey*, 20 F. Supp. 619. Judge Coxé of the District Court decided that such compromise payments were *not within the definition of income*. In that case Judge Coxé said:

"The property received by the plaintiff is not within this definition. It was *not a gain* derived from capital. The plaintiff was not investing his capital *but trying to obtain it*. There was no gain, either, from labor. The will contest was not entered into for profit. Neither was the legal expense deductible as a loss. *Meriman v. Commissioner* (C. C. A.) 55 F. (2d) 879. No more was it productive of income. I do not think, therefore, that the property received was *in any sense income*." (Italics ours.)

In that case Judge Coxé in speaking of the *Kearney* case also said:

"The government relies heavily on the case of *Bernard O. Kearney*, 31 B. T. A. 935, decided by one member of the Board of Tax Appeals. * * * The board member thought that the taxpayer realized a gain because he had rights which 'cost him nothing,' and these rights were given up 'in exchange for \$23,333.34.' The fallacy in the argument is that no rights were given up which resulted in gain. The property which the petitioner sought to recover was something which he believed he was entitled to by inheritance. When the litigation was settled, he only received part of what otherwise would have come to

him if the will had been overthrown. I think this should have been held to be *capital* and *not income*.

It is unnecessary to decide whether the property received by the plaintiff is within the exemption provision of section 22(b)(3) of the Revenue Act of 1932 * * *; it may still be nontaxable although not covered by any specific exemption." (*Italics ours.*)

This decision was reversed by the Second Circuit Court in *Lyeth v. Hoey*, 96 F. (2d) 141, on the ground that such payments constituted income within the definition laid down in Section 22(a) of the Internal Revenue Code. However, it is important to observe that the United States Supreme Court in *Lyeth v. Hoey*, 305 U. S. 188, *reversed* the Second Circuit Court and *affirmed* Judge Coxe's decision in the District Court, and at the end of the opinion, the *Honorable Charles Evans Hughes*, said:

"* * *. We are of the opinion that the exemption applies.

In this view we find it unnecessary to consider the other questions that have been discussed at the bar.

The judgment of the Circuit Court of Appeals is *reversed* and that of the *District Court is affirmed*." (Meaning of course, Judge Coxe's decision.) (*Italics ours.*)

It is therefore obvious that the Supreme Court repudiated the unsound "capital gain theory" adopted by the Second Circuit Court in that case and the Board member in the *Kearney* case.

The Fourth Circuit Court decision in *Magruder v. Segebade*, 94 F. (2d) 177 (1938), is a strong and controlling case upholding Appellee's contention that what she

received was *not income* within the Sixteenth Amendment. The Circuit Court in that case, on page 178, said:

“The sole question raised on this appeal is whether the amounts received by the plaintiffs under the compromise constitute taxable income.”

Then after pointing out that neither Congress nor the Sixteenth (16th) Amendment empowering Congress to tax incomes had defined the term “income”, but the Supreme Court had defined it in the following cases: *Stratton's Independence, Ltd. v. Howbert*, 231 U. S. 399; *Eisner v. Macomber*, 252 U. S. 189; and *Bowers v. Kerbaugh-Empire Company*, 271 U. S. 170, the Circuit Court, in a unanimous opinion, said:

“Considering the facts in this case in the light of the decisions of the Supreme Court, the Acts of Congress, and the Regulation of the Commissioner of Internal Revenue, we are forced to the conclusion that *the amounts received by the plaintiff did not constitute income within the meaning of the Sixteenth Amendment.*

The plaintiffs would have received a greater amount under the first will than under the later will. Had they been successful in contesting the second will and establishing the first will as valid, the amount that would have been received by them would undoubtedly have been a bequest or inheritance and no reasonable contention could be made that the whole amount was taxable income. *Does the fact that they agreed, by way of compromise, to accept a lesser amount, a part instead of the whole, change the character of what was received?* Was it not still a bequest or inheritance, although they surrendered a part of it rather than run the chance of litigation?

It is not necessary to decide these questions for certainly there was no gain derived from either capital or labor or from a sale or conversion of capital assets.

The precise question involved here was considered in the case of *Lyeth v. Hoey*, D. C., 20 F. Supp. 619, where the amount received by the compromise of a contested will was involved. *Judge Cox*, in a well-considered opinion, reached the same conclusion as was reached here by the court below.

It is contended on behalf of the defendant that the sums received by the plaintiffs were acquired by purchase under a contractual arrangement and a decision of the Board of Tax Appeals in *Kearney v. Commissioner*, 31 B. T. A. 935, holding to that effect is relied upon. In the *Kearney* case the Board held that there was a gain to a taxpayer, compromising a will contest, 'derived from capital, from labor, or from both.' *We do not approve of the reasoning of the Board in this case.* There is more reason for holding that the amounts received by the plaintiffs come within the meaning of the words used in the exemption granted in the Revenue Act of 1934, above quoted, than for holding that they were taxable income.

* * * * *

The results of a compromise of rights, the proceeds of which rights are not taxable, do not become taxable because the compromise was brought about by an agreement not to litigate." (Italics ours.)

We believe therefore that on principle as well as authority we have shown that what Mrs. Gavin received in the compromise settlement was not *income* and therefore was not taxable as such.

II.

What Appellee Received Was an Inheritance and an Acquisition in Devolution of the Decedent's Estate Within the Provisions of Section 22(b)(3) of the Revenue Act of 1934.

As hereinabove shown, Appellee received no *income* in any sense. That which she received was in the nature of an *inheritance* and was an *acquisition in devolution* of the Estate of Flood. The property (4/27ths of the estate) was distributed to her and her assignees (attorneys and investigators) under the Decree of Distribution of the Probate Court having jurisdiction thereof. [R. 104-158.] She and her assignees also received \$100,000 cash from James Flood, the son of the decedent, Mary Emma Flood (Stebbins), daughter of the decedent, and Maud Lee Flood, the decedent's widow, who was also Executrix and Trustee of decedent's estate. This money was received in lieu of 4/27ths of the corporate stock of Rancho Santa Margarita, a corporation, and the above mentioned real estate in San Francisco which went to Maud Lee Flood, James Flood, and Mary Emma Flood (Stebbins) as *residuary devisees and legatees*. As shown by the decree of distribution herein [R. 104, 158], Mrs. Gavin did not receive any portion of these specific properties. It is perfectly obvious that a minority interest in that ranch corporation (now Marine Base, Camp Pendleton) and in the said San Francisco property was worth much more to the holders of the majority interest therein (residuary devisees and legatees) than it would have been in the hands of Appellee and her assigns.

Appellee as the pretermitted daughter of decedent had, in March 1927, filed a petition for partial distribution to recover 2/9ths of said estate. This was pursuant to Sec-

tion 230 of the Civil Code of the State of California and Sections 90 and 91 of the Probate Code of California (*Appendix, infra*), and, under said sections she not only had the right to, but did vigorously maintain and prosecute those proceedings. Under Section 90 of the Probate Code intestacy is created as to a pretermitted child and under Section 91 of that Code, the devisees and legatees must abate their respective shares proportionately and provide for said pretermitted daughter. To prevent further litigation and to settle the matter, the parties after years of litigation (1927 to May, 1933) began arranging for a compromise and between May, 1933 and February 28th, 1934 worked out an arrangement and the details thereof. In accordance with that arrangement she was to receive \$100,000 cash and 4/27ths of the estate, except the said San Francisco real property and the corporate stock in Rancho Santa Margarita; and by the arrangement her said assignees were to receive 1/2 of said settlement. The compromise arrangement therefore determined the amount to be received by Appellee and her assignees. The Probate Court then made a Decree of Distribution in accordance with said compromise arrangement.

We contend that in any case where a Probate Court directs the transfer or distributes the decedent's property to a person not named in the will, the property is acquired by *inheritance*. In any event, property so acquired by the distributee is *an acquisition in devolution of the decedent's estate*.

The Probate Court is bound by certain rules of law in distributing a decedent's estate: (1) the laws of decent and distribution if no will is probated; (2) the law permitting the probate of a will with the legal requirements as to testamentary capacity, absence of undue influence,

etc.; (3) the law permitting distribution of the estate where there is a contest, in accordance with a compromise agreement approved by the court; (4) the law requiring the court to name the persons and the proportions or parts to which each is entitled in its decree of final distribution. See Sections 1020 and 1021 of the Probate Code of California. *Appendix, infra.*

No matter which laws govern the distribution of a decedent's estate, such a distribution is *an acquisition by the distributee in devolution of a decedent's estate* within the intent of Congress in adopting the provisions of Section 22(b)(3) of the Revenue Act of 1934. *Appendix, infra.*

Suppose, for example, that a California resident devised and bequeathed his separate property in trust for the benefit of his wife for life with the remainder to a stranger, there being no children, and suppose, the wife contests the Will as being made under undue influence, and prior to a suit on the merits, an agreement is reached whereby the Will is not to be admitted to Probate and that the wife and the stranger shall each take one-half ($1/2$) of the estate outright. Assume further that the Court approves the settlement agreement and in accordance therewith distributes the property to them. Neither the wife nor the remainderman (stranger) would take under the Will. The stranger would get something very different than the remainder provided for in the Will. He would get a present interest in one-half ($1/2$) of the estate. The wife likewise would not take under the Will but under the law of descent and distribution. That couldn't be true of the remainderman because he is a stranger and not related to the decedent. Technically, the stranger would not take by inheritance, bequest or devise. It would be *an acquisition in devolution of a decedent's estate* pur-

suant to the agreement and the order or decree of the Probate Court distributing the decedent's estate.

In the above hypothetical case it is doubtful whether the remainderman (stranger) would have any reason to attack the Will, although he is eligible to do so, but he certainly had a *right to defend it* from the wife's attack. Both of them therefore had a *standing or status which commanded the compromise*. We do not believe that the government would claim that the property received by the said remainderman (stranger) would be subject to income tax because what he received under that compromise agreement was *an acquisition in devolution of said decedent's estate*. Judicial approval of the compromise agreement is merely one way in which a Probate Court may distribute an estate of a decedent.

Appellee's case is much stronger than the case assumed above because she had a right to attack the Will and assert her rights as the pretermitted daughter of the decedent. She had the *standing and status that commanded the compromise settlement and which was recognised by it*. The Probate Court in San Mateo, and the Honorable Judge James sitting therein, knew all about the settlement arrangements and approved the same and carried them into effect in accordance with the arrangement theretofore agreed upon by the parties. As hereinabove indicated, a number of things were done at the same time to accomplish a desired result. The various steps taken and the various forms used were only matters of *form* and were all a part of the means to an end; the *substance* of the transaction was to end the litigation and distribute to Mrs. Gavin $\frac{2}{3}$ of $\frac{2}{9}$ ths of the estate and that is what was accomplished. It makes no difference what

formalities were gone through; it is the *substance* that counts.

When this tax matter first arose the Government was relying on the *Kearney* case *supra* (long since overruled), and in 1938 when the tax was paid the latest decision was that of the Second Circuit in the *Lyeth* case. That decision was diametrically opposed to the decision in the *Segebade* case, but the Circuit Court decision in the *Lyeth* case was later. Had the tax not been paid until after the Supreme Court decided the *Lyeth* case, in which that Court upheld the Fourth Circuit in the *Segebade* case and reversed the Second Circuit in the *Lyeth* case, it is our belief that the Government would never for a moment have contended that what Mrs. Gavin received was taxable. It is our belief and contention now that under the last mentioned Supreme Court decision, and under all of the other law of the land on the subject, Appellee is entitled to a refund of the income taxes involved herein which were so erroneously assessed against her.

In the case of *Lyeth v. Hoey*, 305 U. S. 188, the United States Supreme Court determined that the value of property received from the estate of a decedent by a person compromising his claim as an heir was not taxable as income. As pointed out by the honorable and very learned Chief Justice Hughes in his well reasoned opinion, it was *Lyeth's asserted claim as an heir* that placed the amount received in compromise within the exclusion of Section 22(b)(3) of the Internal Revenue Code. He states as follows:

“There is no question that petitioner obtained that portion, upon the value of which he is sought to be taxed, because of his standing as an heir and of his *claim in that capacity*. It does not seem to be ques-

tioned that if the contest had been fought to a finish and petitioner had succeeded, the property which he would have received would have been exempt under the federal act. Nor is it questioned that if in any appropriate proceeding, instituted by him as heir, he had recovered judgment for a part of the estate, that part would have been acquired by inheritance within the meaning of the act. We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is *too formal to be sound*, as it disregards *the substance* of the statutory exemption. It does so, because it disregards the heirship which underlay the compromise, *the status which commanded that agreement and was recognized by it*. While the will was admitted to probate, the decree also required the distribution of the estate in accordance with the compromise and, so far as the latter provided for distribution to the heirs, it overrode the will. So far as the will became effective under the agreement it was because of the *heirs' consent and release* and in consideration of the distribution they received by reason of their being heirs. Respondent agrees that the word "inheritance" as used in the federal statute is not solely applicable to cases of complete intestacy. The portion of the decedent's property which petitioner obtained under the compromise did not come to him through the testator's will. That portion he obtained because of his heirship and to that extent he took in spite of the will and as in case of intestacy. The fact that petitioner received less than the amount of his claim did not alter its nature or the quality of its recognition through the distribution which he did receive." (Italics ours.)

In that case the learned Chief Justice, with reference to Section 22(b)(3), also said:

“In exempting from the income tax the value of property acquired by ‘bequest, devise, or inheritance,’ Congress used comprehensive terms embracing *all acquisitions in the devolution of a decedent’s estate.*” (Italics ours.)

As hereinabove stated, the Supreme Court, at the end of the opinion in that case, remarked that it was unnecessary to decide the *other points* raised in the case. In the briefs in that case it was contended by *Lyeth* that such receipts were not *income* under the Sixteenth (16th) Amendment. So, that is one of the points which that Court did not then *directly* decide, but did, we think, *indirectly* decide when it reversed the Second Circuit Court and affirmed the judgment of Judge Coxe in the District Court, because he had held that it was *capital* and *not income*. Furthermore, the Supreme Court reviewed the *Lyeth* case because of the conflict between the views of the Second Circuit in that case and the Fourth Circuit in the *Segebade* case, *supra*, and the Supreme Court approved the latter case, wherein the Fourth Circuit had held such receipts not to be *income*. Accordingly, it is our opinion that the Chief Justice would have directly held that such receipts were *not income* had it been necessary to so directly decide in disposing of the *Lyeth* case. It is also our opinion that the Chief Justice was referring to and speaking of the facts as they happened to be in that case, but so far as the *principle* he was enunciating was concerned, he would have reached the same result had it been our case that was before him instead of that of *Munro Lyeth*.

Likewise, the Board of Tax Appeals in *Keller v. Commissioner*, 41 B. T. A. 478 had the following to say:

“The petitioner relies primarily and strongly upon *Lyeth v. Hoey*, 305 U. S. 188. The respondent with equal vigor contends that such decision is inapplicable, because petitioner *was not*, like the claimant in the cited case, *an heir of the decedent*. Though other cases are cited by both parties, it is apparent that the conclusion to be reached here rests largely upon construction and application of *Lyeth v. Hoey, supra*. In that case the Supreme Court had before it a grandson who objected to probate of the will of his grandmother, whose heir he was, and compromised with the other claimants under the will to the effect that the will should be probated and that he receive certain amounts, more than provided for him by the will. The Court held that the amounts received by him were not taxable as being received by inheritance, under section 22 (b) (3) of the Revenue Act of 1932. The petitioner herein argues that there is no essential difference between the situation here and that in the *Lyeth* case, *while the respondent contends that the Supreme Court stressed the fact that the contestant there was an heir, while here the petitioner was neither heir nor relative, but only a friend of the testatrix*, that the will making her a legatee was never probated, and that therefore, *Lyeth v. Hoey* is wholly inapplicable.

We think the distinction made by the respondent is *not consonant with the principle*, in the mind of the Supreme Court in deciding the *Lyeth* case. The Court said:

‘In exempting from the income tax the value of property acquired by “bequest, devise, or inheritance,” Congress used comprehensive terms embracing *all*

acquisitions in the devolution of a decedent's estate.

* * *

We think that what the petitioner received was an 'acquisition in the devolution of a decedent's estate.'

* * *'' (Italics ours.)

In the *Keller* case, quoted from above, a compromise settlement agreement had been entered into and "*after a revocation of the facts in litigation,*" the agreement provided in effect that Charlotte Keller should receive one-third ($\frac{1}{3}$) of the estate and that *Max Horn* and his associates receive two-thirds ($\frac{2}{3}$) thereof; and it was agreed that *Max Horn* and associates should assign to *Charlotte Keller* one-third ($\frac{1}{3}$) of the estate to which they would or may become entitled to under the will of 1933, and that *Charlotte Keller* would assign to *Max Horn* two-thirds ($\frac{2}{3}$) of any and all property to which she would be entitled under the Will of May, 1929, and the Codicil of November, 1929. The agreement also provided that if the probate of the Will of 1933 should be revoked, *Max Horn* and associates at their own expense were to employ counsel and assist attorneys for *Charlotte Keller* to prosecute her petition to probate the 1929 Will and codicil. The latter agreed to deliver upon demand to the attorneys for *Max Horn* and associates a *dismissal with prejudice* of her petition for revocation of the probate of the Will of 1933. In December, 1934 the Court entered its decree, citing that *Max Horn had assigned* one-third ($\frac{1}{3}$) of his interest to Charlotte Keller. Later the Court distributed property to Charlotte Keller *as the assignee of Max Horn*. Certain distributions were also made to Charlotte Keller's attorneys.

The foregoing are some of the salient facts in the said *Keller* case which the Tax Court was dealing with in

deciding that case and it will be observed that the Tax Court looked at the *substance not the form* of the things that were done in connection with the compromise settlement. That is what should be done in the case at bar.

The Board of Tax Appeals, in the *Keller* case also pointed out that the decision in *Lyeth v. Hoey* could not mean that one must be an *heir* and take only in the one category of *inheritance* in order to be free from taxation upon receipts from a compromise.

It may be argued, as it was in the trial of the case at bar, that Charlotte Keller was a legatee under a former Will. That is true, and it also is true that she was a total *stranger* to the decedent. There was a later Will and therefore Charlotte Keller was not and could not be entitled to anything from the estate until she succeeded in *two*, and possibly *three*, pieces of litigation: (1) attacking and upsetting the later Will; (2) proving and admitting the former Will to probate; and, (3) defending it from attack. The point is that she had sufficient interest under the law to have a *right to litigate the matters*, which she did. It was *that right, that standing or status that commanded the compromise settlement* and what she took under it was therefore an *acquisition in devolution of the decedent's estate*.

So, with the appellee here, she had an interest sufficient under the law to attack the Will of Mr. Flood. She had the *right to assert her claims and she had the right to litigate for her share as a pretermitted daughter*. She was doing that very thing, and had been engaged therein for over six (6) years, and it was a determined fight, if there ever was one. So, we insist that she too, on *principle* and under the authorities, had *the right, the standing and*

the status which commanded the compromise settlement and which was recognized by it, regardless of the formalities that may have been indulged in consummating the settlement. Therefore, what she received in settlement was likewise an acquisition in devolution of the decedent's estate.

We refer also to the following cases which support appellee:

Estate of Lilly B. Howard v. Commissioner, B. T. A., Docket No. 109188;

Helen Irene Rhodes v. Commissioner (1944), Tax Court Docket No. 1709;

Sage, et al v. Commissioner (C. C. A.), 1941, 122 F. (2d) 480.

The *Howard* case is directly in point. In that case, one Mary Alice Castro filed a petition for determination of heirship against the decedent's estate. She claimed to be the illegitimate daughter of the decedent and as such was entitled to one-half of the estate. A trial was had with a jury and a verdict was rendered that she was decedent's daughter. A new trial was granted, and the petitioner appealed to the Supreme Court of the State of California alleging error in the granting of a new trial. Pending the appeal, a compromise settlement was entered into whereby Mary Alice Castro's claim and interest in the estate were settled for \$15,000. The Probate Court approved the settlement and ordered the executors to pay the \$15,000., which sum was paid by the estate. In preparing the estate tax return, the executors deducted the sum of \$15,000 which was paid to Mary Alice Castro as an allowed claim against the estate. The Commissioner

contended that the sum paid to her was unallowable as a deduction, for the reason that it "*partakes of the nature of the inheritance.*" The Court said:

"* * * to say the least, the compromise was based upon *her claim that she was such a daughter.*
* * *" (Italics ours.)

The *Sage* case cited, *supra*, involved the following situation: One *John Sage* died testate leaving a widow who was adjudged incompetent two months later and for whom guardians were appointed by the Orphan's Court of New Jersey. Testator, left an estate of about \$450,000. By his Will he gave his wife the household effects and a legacy of about \$42,000. After other specific and pecuniary legacies, he bequeathed the converted residuary estate to the *Lord Provost* of Glasgow, Scotland, outright, and added a request that the *Lord Provost* distribute the same to certain institutions caring for the blind, etc. The Will was offered for probate before the Surrogate Court in New York. The guardians of *Mrs. Sage* opposed. The Surrogate in New York directed the Will be transmitted to the Surrogate of Bergen County, New Jersey, and the New York Court dismissed all proceedings. The Will was then filed for probate in Bergen County, New Jersey, and citations were issued. At that stage a compromise settlement was made whereby the guardians were to *withdraw all objections to the probate and they were to consent to the probate.* The *Lord Provost* agreed to pay the guardians 25% of the gross amount payable to the *Lord Provost* under the Will. The Guardians petitioned the Orphan's Court for and obtained approval of the compromise agreement. The same day the Will was admitted to probate in Bergen County. When the estate was closed distribution was made to the *Lord Provost*.

There was no provision in the decree for the widow or her guardians. The executors of the estate were not parties to the compromise agreement, nor was the agreement ever a part of the probate proceedings. The *Lord Provost* paid the guardians pursuant to the agreement.

In that case the Third Circuit Court said:

“If these matters be material, it should also be noted, in passing, that the decree of distribution, as well as the decree settling the executors’ account, was entered by *the same court acting by the same judge* as had approved the compromise agreement prior to *and as a part of the withdrawal of the objections to the will, and the probate thereof.*” (Italics ours.)

The Court pointed out that what the widow received was an *inheritance* and was subject to estate tax. The Court also stated that the *Sage* case and the *Lyeth* case were the same in *principle*, even though one involved *income tax* and the other, *estate tax*. They said that that was merely a difference in words. The Court pointed out that the widow had the *right to contest the will* “(which, incidentally, was being exercised)” and that she therefore had the *status to command the compromise agreement*.

In the *Lyeth* case, the sole issue was whether the acceptance of a lesser amount as the result of a compromise of his asserted claim as an heir constituted taxable income. This is the precise question in the instant case. Here appellee asserted that she was a pretermitted heir and as a result of her asserted claim she received a substantial amount in compromise.

The Government is attempting to draw a distinction between the *Lyeth* case and the case at bar and persists in referring to appellee’s claim to be an heir. The fact is

that she was not merely claiming to be an heir. She was asserting and was prepared to, was proving, and did, in our opinion, prove that she was an heir. She had, among other things, proved that from the time she was three (3) months of age she lived in the home of James L. Flood as a member of his family and had been raised and educated by him and otherwise had been treated and recognized as his daughter. A reading of the *Estate of Flood* in 217 Cal. 763 [R. 59-84] should convince anyone of that. We fail to see any distinction, in *principle* between the *Lyeth* case and the case at bar. Mrs. Gavin claimed that she was the pretermitted daughter of the decedent. She had the right to and did assert that fact; and she had the right to and did litigate the same to recover what she was entitled to. It was her *standing and status in that respect that commanded the compromise settlement* and what she received was *an acquisition in devolution of the Flood estate*. Any reasonable person knows that no one, let alone the able counsel representing the *Flood* estate, would have settled with her for 2/3rds of 2/9ths of that estate unless her position was very strong and substantial and the success of her litigation very imminent. What could possibly have been accomplished in the trial of the case at bar by having the District Court decide the question of heirship? What would that prove either way? Certainly, from a logical standpoint, it would not follow that the ultimate decision in Redwood City would have been the same as that in the District Court. Furthermore, what would be the sense of a person compromising a case if he then had to retry the case he settled in order to establish his rights with reference to taxes?

The Government contends that in order to be entitled to exemption, the taxpayer must prove that the amount

realized was a transfer by reason of the decedent's death; that the taxpayer must also *prove* that she is in fact an heir; and also *prove* that the amount was paid to her as an heir. We do not agree with this contention. Obviously, Mrs. Gavin couldn't assert her claim as a pretermitted daughter until after the death of Mr. Flood. When he died testate and she discovered she was not named in his Will, she had the right to and did in no uncertain manner assert that she was his daughter and demanded 2/9ths of his estate as his pretermitted heir. If he had named her in the Will and given her nothing she couldn't contest until after his death. It seems obvious therefore that her rights as such pretermitted daughter accrued upon his death and that the transfer of what she received came about by reason of his death. She got it because of her litigation to prove that she was his daughter and pretermitted heir and the *Flood* estate and the representatives thereof compromised with her for 2/3rds of 2/9ths of her share. If that does not fulfill the requirements necessary to make it *an acquisition in devolution* of Mr. Flood's estate, we apparently do not understand the *principle* underlying that doctrine.

Suppose there were various formalities in connection with the compromise settlement saying pink is blue or black is white, what of it? So was there in the *Keller* case, *supra*, the *Sage* case, *supra*, and many others. We all know that cases, involving much less than this one, are settled time and again and that releases absolving defendant from blame and liability are signed (when he pays the plaintiff). That, in *substance*, does not mean that the defendant was blameless and without liability because obviously the injured party would not sign such a release unless he received a satisfactory settlement. Sometimes

defendant arranges to settle with plaintiff and plaintiff consents to judgment in favor of defendant. What is the difference? It is the *substance* of the thing, not the *form* that counts. Likewise, with Mrs. Gavin in this case. The loss of this case was undoubtedly a "bitter pill" for the representatives of the *Flood* estate and its counsel, and it may be that it made them feel better to handle matters in the form employed in the settlement. It is also easy to understand that they may have been thinking of possible future claims. Be that as it may, in *substance* they settled with her and distributed 2/3rds of 2/9ths of the estate to her.

As stated by the Honorable Judge Harrison in his decision of this case, if *form* is disregarded for *substance*, the money received under the decree of distribution in the *Flood* estate was *an acquisition in the devolution of said estate*. In *substance* this case is directly within the scope of the rule laid down in the *Lyeth* case, *supra*, and except for the *form* in which the compromise was effected, the Government concedes that the property received by her would not be taxable.

In the case of *Volunteer State Life Insurance Company v. Commissioner*, 35 B. T. A. 491, the Board said:

"A 'consent' judgment has been defined as a contract of the parties spread upon the record with approval and sanction of a court of competent jurisdiction. *Weaver v. Hampton*, 161 U. S. 480; 201 N. C. 798. A 'consent decree' is *not a judgment of the court*, but is a contract between the parties entered into of record with the court's consent, and is not necessarily based upon pleadings or records in the case. *Standard Supply Co. v. Delmar Coal Co.*, 110 W. Va. 560; 158 S. E. 907. The order in question was a disposition of the suit by the parties and not

by the Board, *Berry v. Somerset R. Co.*, 89 Me. 552; 36 A. 904. It was *not a judicial rendition on the merits* and cannot be the basis of a claim of *res judicata* in the present proceeding. *Almours Securities, Inc.*, 35 B. T. A. 61. * * *” (Italics ours.)

We therefore respectfully submit that in the case at bar, it is the *substance* of the situation and not the *form* by which the settlement was consummated that controls. We are firmly convinced and believe that we have shown that what Mrs. Gavin received in the compromise settlement comes squarely within the principle and spirit, reason and intent of Section 22 (b)(3) of the Revenue Act of 1934 because it was an *acquisition in devolution of the Flood estate*.

As we have heretofore pointed out there is no merit in the appellant's contention that Mrs. Gavin received the settlement from the heirs and not from the estate. By necessity the heirs, devisees and legatees had to give up something; there is no other way to take care of a pretermitted heir. Furthermore, as stated in the *Segebade* case, *supra*, the *Sage* case, *supra*, the *Keller* case, *supra*, and other cases, it makes no difference who does it or how they do it. The important thing is that there is a settlement of a contest against the estate under which the recipient gets part of the estate. Again we say it is the *substance* of the thing that controls, not the *form* or the manner in which the result is accomplished.

In *Keller v. Commissioner*, *supra*, the Board of Tax Appeals said:

“We think that what petitioner received was an ‘*acquisition in the devolution of a decedent's estate*.’ It was distributed to her directly by the probate

court, as was the remainder of the estate to the legatees or devisees. It is true that such *distribution designated her as assignee, but the assignment was because of compromise of her own claim as legatee.*" (Italics ours.)

In *Helen I. Rhodes v. Commissioner*, *supra*, the compromise there was an agreement between the petitioner, who was contesting her father's will, and her brother, and the brother agreed *to purchase or secure a third party to purchase* the shares of stock which the petitioner was entitled to under the will. It is certain that the facts of this case are much weaker than our case, and yet the Board held that the amount received from her brother *did not constitute income* by reason of the compromise of her claim. See also *Helen R. Goldman v. Commissioner*, B. T. A. Docket No. 112259.

Summary and Conclusion.

As hereinabove shown, on principle as well as under the authorities, the value of the money and property received by appellee was not *income* within the Sixteenth (16th) Amendment to the United States Constitution or in any sense of the word. Accordingly, it should not be necessary to consider whether it comes within any exclusion or exemption provision of the Revenue Act of 1934 because the provisions of that Act do not apply until there is *income* to which it may be applied. It should therefore be unnecessary for appellee to bring herself within any exclusion or exemption provision of the Act unless and until it is first determined that what she received, in compromise of her litigation to recover her share as the pretermitted daughter of James L. Flood,

was *income* within the said Constitutional Amendment. We know of no theory other than that expounded in the *Kearney* case, *supra*, which has been repudiated and overruled, under which it could be so held. Such an unsound and far-fetched theory is contrary to fact and repugnant in principle.

Even if there was any plausible basis under which it could be said that amounts received in settlement under such circumstances constituted income within the Sixteenth (16th) Amendment, the settlement appellee received would, on principle and under the above mentioned authorities, be an *inheritance*, or at least an *acquisition in devolution of the Flood estate*, and would fall squarely within the intent, spirit and reason of the exclusion of Section 22 (b)(3) of the Act.

We should bear in mind, as shown by the record [R. 59-84], that appellee, when a small child, lived in the home of Mr. Flood and his first wife and was raised by them. There was great love and affection between Mr. Flood and the appellee and also between the latter and the then Mrs. Flood.

After Mr. Flood married his deceased first wife's sister, the present Maud Lee Flood, this little girl travelled with them and made trips with them to the Orient and elsewhere. Thereafter, appellee was placed in a convent where she was maintained and educated by Mr. Flood. In the meantime Mr. Flood had two children by Maude Lee Flood, namely, James Flood and Mary Emma Flood (now Stebbins).

After his death in February, 1926, she discovered that she was not named in his Will and that his Will provided for his estate to go to Maude Lee Flood, James Flood, Jr.,

Mary Emma Flood (now Stebbins) and certain other beneficiaries. She thereupon asserted her rights and in March, 1927, filed a petition for partial distribution to recover her share (2/9ths of the estate) as the pretermitted daughter of the decedent. She prosecuted the litigation vigorously clear through the Supreme Court of California and was determined in her efforts to get her just share of said estate. Between May, 1933 and February, 1934, after years of litigation, a compromise settlement was arranged and agreed upon and the same was consummated as hereinabove set forth and the money and property was distributed to her and her assignees. Certainly the amounts received by her under the circumstances was not and could not be classified as *income*. It was an *inheritance* and it is obvious that inheritance taxes and estate taxes were paid on it. Certainly, what she received was *an acquisition in devolution of that estate*.

To assess an income tax on the proceeds of said settlement was not only erroneous and contrary to law but quite unjust and the Judgment of the Honorable United States District Court for a refund thereof and interest thereon should be sustained and affirmed.

Respectfully submitted,

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APPENDIX

UNITED STATES CONSTITUTION, AMENDMENT SIXTEEN (16)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

REVENUE ACT OF 1934, C. 277, 48 STAT. 680:

SEC. 21. NET INCOME.

“Net income” means the gross income computed under section 22, less the deductions allowed by section 23.

SEC 22. GROSS INCOME.

(a) **General Definitions.**—“Gross income” includes gains, profits and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * *

(b) **Exclusions from Gross Income.**—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) **Gifts, Bequests, and Devises.**—The value of property acquired by gift, bequest, devise, or inheritance (but

the income from such property shall be included in gross income);

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) **General Rule.**—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) **Definition of Capital Assets.**—For the purposes of this title, “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * * * *

PROBATE CODE OF CALIFORNIA (1931), DIV. I, CHAP. IV:

Sec. 90. Rights of children and grandchildren. When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate.

Sec. 91. Sources of unmentioned child's share. The share of the estate which is assigned to a child or issue omitted in a will, as hereinbefore mentioned, must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

PROBATE CODE OF CALIFORNIA (1931, 1933), DIV. III, CHAP. XVI, ART. III:

Sec. 1020. Final distribution: Procedure. Immediately upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the

application of the executor or administrator, or of any heir, devisee or legatee, or his assignee, grantee or successor in interest, and after notice given for the period and in the manner required by section 1200 of this code, the court must proceed to distribute the residue of the estate among the persons entitled thereto. Any person interested in the estate or any coexecutor or coadministrator may resist the application.

PROBATE CODE OF CALIFORNIA (1931), DIV. III, CHAP. XVI, ART III:

Sec. 1021. **Decree of distribution.** In its decree, the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees.

CIVIL CODE OF CALIFORNIA (1872), DIV. I, PT. III, TIT. II, CHAP. II:

Sec. 230. **Adoption of illegitimate child.** The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

No. 11251.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CONSTANCE MAY GAVIN,

Appellee.

Upon Appeal from the District Court of the United States
for the Southern District of California.

REPLY BRIEF FOR THE UNITED STATES.

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No. 11251.

IN THE

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UNITED STATES OF AMERICA,

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vs.

CONSTANCE MAY GAVIN,

Appellee.

REPLY BRIEF FOR THE UNITED STATES.

The Amount Realized by the Taxpayer Was Income Under the Sixteenth Amendment.

This reply brief is submitted to state the Government's position on the constitutional question raised in the taxpayer's brief and not covered in the Government's original brief.

Before stating that position, it should be pointed out that there is no apparent foundation in the record for the statement in the taxpayer's brief (pp. 4, 8) that \$100,000 was paid to the taxpayer and her assigns in lieu of a 4/27ths interest in the corporate stock of the Rancho Santa Margarita and certain real estate. In any event, the fact is immaterial in view of the undisputed fact that the money was specifically to be paid out of the funds of certain beneficiaries and not out of the estate of the deceased.

The only other aspect of the taxpayer's brief which merits reply is the assertion that the amount she realized under the contract in settlement of her claim was not income under the Sixteenth Amendment to the Constitution of the United States which provides that—

The Congress shall have the power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

Pursuant to this grant of authority, Section 22(a) of the Revenue Act of 1934, c. 277, 48 Stat. 680, defined the term "gross income" as "gains, profits and income" derived from a number of specified sources including those derived from "sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property" or "gains or profits in income derived from any source whatever." Section 21 defined the term "net income" to mean the gross income computed under Section 22, less the deductions allowed by Section 23.

Section 22 is couched in broad language. *Helvering v. Clifford*, 309 U. S. 331, 334. The Congress intended to exert its power to tax to the fullest extent possible and to reach every sort of income subject to the constitutional power. *Commissioner v. Wilcox* (S. Ct.), decided February 25, 1946 (1946 P-H Tax Service, par. 72,014); *Helvering v. Midland Ins. Co.*, 303 U. S. 216, 223; *Helvering v. Stockholm etc. Bank*, 293 U. S. 84, 89; *Eisner v. Macomber*, 252 U. S. 189; *Irwin v. Gavit*, 268 U. S. 161. Embraced within the definition is the gain that is ordinarily viewed as "income" within the ordinary mean-

ing of that term. See, *e. g.*, *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, 364; *United States v. Kirby Lumber Co.*, 284 U. S. 1, 3.

If the Government is correct in its position that the amount acquired under the settlement agreement was not an "inheritance" we believe that it necessarily follows under the very nature of the contract that the amount the taxpayer acquired was necessarily income.

The taxpayer did not acquire the consideration from the other parties by "purchase" or "gift" or "bequest." And, if it was not acquired by law through intestate succession, then it necessarily follows that what she acquired was either by disposition of her claim, or in compensation for certain action or nonaction on her part.

In essence, the taxpayer received property in consideration of her surrendering and forbearing further to pursue a claim which she had by virtue of her position as a claimant to be an heir. The transaction may be considered in two different aspects. In one sense the taxpayer surrendered or transferred a "property right," namely, her claim or cause of action against the estate. In another view, she received a payment made to induce her to refrain from an act which might have been detrimental to the beneficiaries under the will. The result is the same in either case and the amount received by the taxpayer constitutes taxable income within the meaning of Section 22(a) of the Revenue Act of 1934, and the Sixteenth Amendment to the Constitution.

Considered from the viewpoint of the disposition of property, there can be little argument that the taxpayer's claim against the estate, a *chose* in action was a property which she could dispose of as she saw fit. Compare

United States v. Safety Car Heating Co., 297 U. S. 88. The taxpayer did dispose of this property by contract for the sum of \$206,974.43 in cash and property. Section 22(a) specifically takes into account the income arising from "dealings in property * * *, growing out of the ownership or use of or interest in such property." The taxpayer's transaction with her property is clearly within the scope of this provision.

The amount of the gain is computed under Section 111 of the Revenue Act of 1934 as the excess of the amount realized over the cost basis of the property which in this case is obviously zero. Whether the contract is to be viewed as a sale or an exchange of the taxpayer's "property" the entire gain is income to her under Section 111. Compare *Helvering v. Gowran*, 302 U. S. 238; *Sterling v. Commissioner*, 93 F. (2d) 304 (C. C. A. 2d), certiorari denied, 303 U. S. 663; *Marine Transport Co. v. Commissioner*, 77 F. (2d) 177 (C. C. A. 5th).

The term "income" is defined in *Stratton's Independence v. Howbert*, 231 U. S. 399, 415, and *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179, 185, arising under the Corporation Excise Tax Act of 1909, c. 6, 36 Stat. 11, as the "gain from capital, from labor, or from both combined." In *Eisner v. Macomber*, *supra*, p. 207, a case arising under the Sixteenth Amendment and the Revenue Act of 1916, the Court accepted that definition with the proviso that it be understood to "include profits gained through a sale or conversion of capital assets." See also *Merchants' L. & T. Co. v. Smietanka*, 255 U. S. 509. The gain realized from the conversion of assets by an exchange obviously comes within that definition. See *Moore v. United States*, 268 U. S. 536. It is assumed at the

present time that gains from exchanges are taxable. See *Groman v. Commissioner*, 302 U. S. 82, 654; *Helvering v. Bashford*, 302 U. S. 454.

The taxpayer's surrender or transfer of her claim to be an heir in return for a valuable consideration, if not technically an exchange, is a dealing in property sufficiently analogous to leave no real doubt of the constitutionality of a tax upon the gain realized therefrom.

If the taxpayer's contract be simply construed as a payment to her for the forbearance or her nonaction in pursuing her claim against the state, it is equally plain that the amount she realized is also taxable. The payment to her added to her wealth of the full value of the property she received. The amount she realized was acquired by contract. It is clear that she was performing certain acts or nonaction in order to realize gain she received. This is income taxable under Section 22(a) as gain "derived from any source whatever."

A payment made to induce one not to act or not to use one's capital, including the resources by means of which she is able to command the services of an attorney in connection with her claim to be an heir of a deceased person, has its source in labor or capital as much as a gain realized through their actual use, and is truly a gain derived from labor or capital or both combined. Thus, in *Cox v. Helvering*, 71 F. (2d) 987 (App. D. C.), the Court held that the payment received upon agreement not to enter upon a competing business was income. The same conclusion was reached in *Salvage v. Commissioner*, 76

F. (2d) 112 (C. C. A. 2d), and the holding was apparently proved in *Helvering v. Savage*, 297 U. S. 106. Also in *Beals' Estate v. Commissioner*, 82 F. (2d) 268, 270 (C. C. A. 2d), the Court said:

A promise not to work for others or for oneself is no more a conveyance of property than is a promise to enter the promisee's employ. Payment for either promise is income, not proceeds received on disposal of a capital asset. [Citing *Salvage v. Commissioner*, *supra*.]

In *Sabatini v. Commissioner*, 98 F. (2d) 753 (C. C. A. 2d), it was held that an author realized income by receiving a payment from a publisher for foregoing the right to authorize others to publish his uncopyrighted works.

It may be well also to refer to the cases holding that graft money received by a public official from a construction company is income (*Chadick v. United States*, 77 F. (2d) 961 (C. C. A. 5th), certiorari denied, 296 U. S. 609), and that bribes are income (*United States v. Commerford*, 64 F. (2d) 28 (C. C. A. 2d), certiorari denied, 289 U. S. 759). It is evident that it would make no difference whether the graft or the bribe were paid to an official to induce him to act or to refrain from acting.

It is no answer to say that if the taxpayer pursued her rights successfully in the probate court what she received would not be taxable as income. In the first place, it is assumed that the question as to what constitutes income should be determined with reference to what income would have been realized if something else had been done, whereas the courts have repeatedly recognized that a transaction would give rise to income if carried out in one way while it would not if carried out in another way. See

Davidson v. Commissioner, 305 U. S. 44, 46; *United States v. Phellis*, 257 U. S. 156; *Helvering v. Tex-Penn Co.*, 300 U. S. 481; *Clemmons v. Commissioner*, 54 F. (2d) 209 (C. C. A. 5th); *Bruce v. Helvering*, 76 F. (2d) 442 (App. D. C.); *Kennemer v. Commissioner*, 96 F. (2d) 177 (C. C. A. 5th). See also *Helvering v. Midland Ins. Co.*, *supra*; *New Colonial Co. v. Helvering*, 292 U. S. 435.

There is, however, a more fundamental difficulty here. There was in this case, on the one hand, a renunciation of a course of action which might, but not positively, have led to a certain result; and, on the other hand, the adoption of a course of action which produced another result. There was not a choice of achieving the same result by different means but a choice of achieving a different result by different means. The taxpayer's argument assumes that if she had pursued her claim, she would have been successful, and a share of the property would have come to her; and hence that under the agreement she merely received part of what would have come to her by inheritance. But this argument assumes what can neither be established nor taken to be true. She might have failed in her claim and received nothing. The most that can be said is that the taxpayer had a highly contingent claim to a part of an estate. She did not realize a part of an inheritance by compromising this claim for she had no inheritance; she merely had a claim to an inheritance through litigation, and she bargained away that possibility. In other words, she forbore further to press a

speculative claim to a part of an estate, which cost her nothing, and received personal property, which was worth \$206,974.43. We submit that she thereby realized a gain from an exchange which constituted income under the statute and under the Sixteenth Amendment.

Respectfully submitted,

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June, 1946.

No. 11260

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SANNOSUKE MADOKORO,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

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No. 11260

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SANNOSUKE MADOKORO,

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vs.

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Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The jurisdictional facts upon which appellant contends the District Court had jurisdiction are adopted by appellee except as follows: This court has jurisdiction under the provision of section 463, subdivision (a) of Title 28, United States Code.

Statutes Involved.

Section 13(a) of the Immigration Act of May 26, 1924 (8 U. S. C. 213(a)):

“Section 13(a). No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa * * *”

Section 13(b) of the Immigration Act of May 26, 1924 (8 U. S. C. 213(b)):

“In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.”

The regulations issued pursuant to the foregoing authority are contained in Rule 3, subdivision F, paragraph 1, of the Immigration Rules of July 1, 1925:

“No immigrant, whether a quota immigrant or non-quota immigrant, of any nationality shall be admitted to the United States unless such immigrant shall present to the proper immigration official, at the port of arrival, an immigration visa duly issued and authenticated by an American consular officer: Provided, That (a) *aliens who have been previously lawfully admitted* to the United States and who are returning from a temporary visit of not more than six months to Canada * * * Mexico * * * or such aliens who are returning from a temporary visit to any other foreign country and who are in possession of a permit to reenter the United States issued in accordance with the provisions of section 10 of the immigration act of 1924, * * * if otherwise admissible, shall be permitted to enter the United States without an immigration visa.” (Italics added.)

Section 13(c) of the Immigration Act of May 26, 1924 (8 U. S. C. 213(c)):

“No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.”

Section 14 of the Immigration Act of May 26, 1924 (8 U. S. C. 214):

“Sec. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this act to enter the United States, or to have remained therein for a longer time than permitted under this act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917 * * *”

Section 23 of the Immigration Act of May 26, 1924 (8 U. S. C. 221):

“Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he

entered the United States lawfully, and the time, place and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Justice.”

Rule 13, subdivision 3, of the Immigration Rules of May 1, 1917:

“Subd. 3. Identification of aliens habitually crossing boundary—The card of identification prescribed by subdivision 9 of rule 12 shall be used also upon the Mexican border.”

Rule 12, subdivision 9, of the Immigration Rules of May 1, 1917:

“Subd. 9. Identification of aliens habitually crossing boundary—With a view to avoid delays and embarrassment in cases of aliens who, residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress. The applicant for such a card shall be required to furnish two unmounted photographs of himself, of appropriate size, for attachment to the card, and shall supply the data necessary to fill out the card in complete form. To guard against the use of the card by any other person than the one to whom furnished (through its being lost or stolen or otherwise improperly acquired) the official issuing the card shall require the applicant to sign his

name partly on the margin of the photograph and partly on the body of the card itself. The card may be issued also to United States citizens desirous of availing themselves of this means of ready identification. It shall constitute a pass which shall be promptly honored by immigration officials simply upon satisfying themselves that the person presenting it is the person represented by the photograph thereto attached and therefore the rightful holder of the card."

Rule 3, subdivision O, paragraph 1, of Immigration Rules of February 1, 1924:

"Para. 1—With a view to avoid delays and embarrassment in cases of aliens and citizens who, residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress. The applicant for such a card shall be required to furnish two unmounted photographs of himself, of appropriate size, for attachment to the card, and shall supply the data necessary to fill out the card in complete form. To guard against the use of the card by any other person than the one to whom furnished (through its being lost or stolen or otherwise improperly acquired) the official issuing the card shall require the applicant to sign his name partly on the margin of the photograph and partly on the body of the card itself: Provided, that such card may be taken up or canceled at any time within the discretion of the proper immigration official."

Statement of Facts.

The appellant herein is a native and subject of Japan, born on March 7, 1893 [Return Ex. A, p. 2].¹ His wife and four children are domiciled in Japan. He has one son, Sumio Madokoro, residing in the United States [Return, Ex. A, pp. 8, 9].

Appellant first entered the United States at the port of Seattle, Washington, on August 21, 1915, as a member of the crew of the vessel "Tacoma Maru" and deserted the vessel [Return Ex. A, p. 3, and Ex. No. 2 therein]. He has resided in the United States continuously since the date of original entry with the exception of various departures to Mexico at the port of Calexico, California, between the years 1918 and 1926 [Return, Ex. A, pp. 3, 4]. His purpose in departing intermittently to Mexico was to farm in Mexicali, Mexico. He states he applied for the border crossing privilege about January or February, 1918, and was issued an identification card [Return, Ex. A, p. 4]. The records of the Immigration and Naturalization Service at Calexico reveal that appellant was granted a duplicate of Border Permit No. 11588, on August 3, 1920, and that an application for an alien resident's identification card was filed by the appellant on April 17, 1925, and he was issued a card valid until October 17, 1925. This card was revalidated later for a ten day period beginning October 15, 1926 [Return Ex. A at Ex. 3 therein].

¹The reference herein preceded by "[Return, Ex. A]" is to the transcript of deportation hearing attached to the Return to Writ of Habeas Corpus as Exhibit A, which Exhibit, by stipulation, was not printed as a portion of the Transcript of Record, but may be considered in its original form by the Circuit Court of Appeals [R. 70].

Appellant last entered the United States, after an absence of about one-half day in Mexico, at the port of Calexico, California, on December 28, 1926, at which time he was in possession of an *expired* border crossing identification card [Return Ex. A, p. 6].

Appellant was apprehended as an enemy alien at Guadalupe, Santa Maria County, California, on February 18, 1942, and delivered to the custody of the Immigration and Naturalization Service at Tuna Canyon Detention Station, Tujunga, California [R. 33]. He was transported to Bismarck, North Dakota, on February 22, 1942, arriving there February 26, 1942, and was placed in a detention station known as Fort Lincoln, North Dakota [R. 33].

A warrant directing the arrest of the appellant was issued under the authority of the Attorney General on March 18, 1942, charging that the appellant last entered the United States at Calexico, California on December 28, 1926, and that he was subject to deportation under the Immigration Act of 1924, in that, at the time of his entry, he was not in possession of an unexpired immigration visa, and was an alien ineligible to citizenship [Return, Ex. A, at Ex. 1 therein]. Appellant was accorded a hearing under the aforesaid warrant of arrest, at Fort Lincoln, Bismarck, North Dakota. The hearing was begun on March 23, 1942, and an interpreter in the English and Japanese languages was utilized [Return, Ex. A, p. 1]. At the beginning of the hearing appellant was permitted to inspect the original warrant of arrest, and he acknowledged that he had received a copy of the said warrant [Return, Ex. A, p. 1]. The charges contained in the warrant of arrest were repeated to him verbatim, and he acknowledged that he understood them [Return, Ex. A, p. 1]. He was

also informed that the purpose of the hearing was to show cause why he should not be deported from the United States, and that he had a right to be represented by counsel, either by an attorney, or other person of good moral character, of his own selection, and at his own expense [Return, Ex. A, p. 1]. Appellant asserted that he did not wish to be so represented, and that he was ready and willing to proceed with the hearing [Return, Ex. A, p. 1].

At the conclusion of the deportation hearing, on March 24, 1942, appellant stated that he had thoroughly understood the interpreter [Return, Ex. A, p. 13]. The proposed findings of fact, conclusions of law, and order of the presiding Immigration Inspector were served upon the appellant, and exceptions thereto were entered by the appellant in the form of a letter signed by him and addressed to the Commissioner of Immigration and Naturalization, dated April 8, 1942 [R. 46, 47, 48 and Resp. Ex. A].²

Thereafter, on August 18, 1942, upon the basis of the evidence adduced at the hearing, a warrant directing appellant's deportation was issued under the authority of the Attorney General [R. 3, 4, 7]. Appellant was ordered interned as an enemy alien on July 20, 1942, and was interned at Lordsburg, New Mexico. On October 17, 1943, he was paroled to the Gila River War Relocation Project, and he remained there until October 23, 1945, when he was released to proceed to Compton, California [R. 33, 34]. Appellant was taken into custody on December 13, 1945, for deportation, pursuant to the outstanding warrant of deportation issued by the Attorney General [R. 7].

²The reference herein to "Respondent's Ex. A" is to the exhibit which is to be considered by the Circuit Court in its original form [R. 70].

ARGUMENT.

What Constitutes an Entry Within the Meaning of the Immigration Laws.

The evidence shows that the appellant's border crossing identification card had *expired* at the time he last entered the United States at Calexico, California, on December 28, 1926 [Return, Ex. A, p. 6, and Ex. 3 therein]. Therefore, appellant's first question, to wit: "Does a 're-entry' into the United States by a resident alien in possession of a border permit issued to him by the Immigration Service, constitute a 'new entry' into the United States within the meaning of Sections 13 and 14 of the Immigration Act of 1924", should be narrowed to conform with the facts by interpolating the word "expired" to modify the words "border permit". However, the question of what constitutes an "entry" or "new entry" within the meaning of the immigration and naturalization laws, is not dependent upon the validity of the documents in possession of the alien at the time of entry. In this case the alien's departure and re-entry at the port of Calexico on December 28, 1926, with an *expired* border crossing permit is simply persuasive evidence of the fact that he was not lulled into any false sense of security by virtue of the possession of the card, nor did the fact that it had expired dissuade him from departing to Mexico.

What constitutes an "entry" within the meaning of Section 14 of the Immigration Act of 1924 (8 U. S. C. 214) has been answered by the Supreme Court in *United States ex rel. Stapf v. Corsi*, 287, U. S. 129, 53 S. Ct.

40, 77 L. Ed. 215, in the following language at page 132, 287 U. S.:

“The relator’s arrival in the United States in April 1929, was an entry into this country notwithstanding he was a member of the crew of an American ship which had made a round trip voyage. He came from a place outside the United States and from a foreign port or place, within the meaning of the immigration laws. *United States ex rel. Claussen v. Day*, 279 U. S. 398, 49 S. Ct. 354, 73 L. Ed. 758. While that case construed section 19 of the Act of February 5, 1917 (8 U. S. C. 1155), and the time limitation therein contained, the decision as to what constitutes an entry is equally conclusive in construing other sections of the immigration law.”

The term “entry” as used in section 19(a) of the Immigration Act of February 5, 1917, was interpreted by the Supreme Court in *United States ex rel. Volpe v. Smith*, 289 U. S. 422, 53 S. Ct. 665; 77 L. Ed. 1298, as follows, at page 425, 289 U. S.:

“We accept the view that the word ‘entry’ in the provision of section 19 * * * includes *any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one.*” (Italics added.)

In *Taguchi v. Carr*, 62 F. (2d) 307, decided by this Court, it was held that the alien’s return to the United States after spending ten days on foreign soil forced by reason of shipwreck, constituted a coming from a foreign country within the meaning of the immigration laws. And in *Blumen v. Haff*, 78 F. (2d) 833, this Court held that there had been an entry within the meaning of the immi-

gration laws where the aliens involved had been brought to the United States through extradition proceedings from England. In *Ward v. De Barros*, 75 F. (2d) 34, the First Circuit Court of Appeals held there was an arrival from a foreign place within the meaning of the immigration laws, where it was unknown to the alien that the train on which he was riding had passed through Mexico. There has also been an "entry" where an alien was deported to the United States from a foreign country following his extradition from the United States at a time when he was subject to deportation from the United States. (See *United States ex rel. Fitleberg v. McCandless*, 3rd Cir., 47 F. (2d) 683.)

Before taking up the second question stated by appellant, attention will be given briefly to the argument of appellant beginning at page 4 of his opening brief, that deportation is barred by the three year statute of limitations contained in section 34 of the Immigration Act of 1917 (8 U. S. C. 166). At the outset such contention is untenable. The deportation warrant is not based upon any of the deportable grounds found in the provisions of the Immigration Act of 1917 (8 U. S. C. 155). Deportation is directed solely under the provisions of the Immigration Act of July 1, 1924 [R. 4]. Application of the deportation provisions of the Immigration Act of 1924, *supra*, is not restricted by any statute of limitations. Section 14 (8 U. S. C. 214) provides "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States * * * shall be taken into custody and deported * * *". This section contains no time limitation within which deportation must be instituted if the last

entry occurred after July 1, 1924. (*Ex parte Sturm*, 38 F. (2d) 272.) The fact that appellant originally entered the United States as a deserting seaman prior to July 1, 1924, has no application where deportation is directed under section 14 of the Immigration Act of 1924, *supra*. (*United States ex rel. Staff v. Corsi*, *supra*.) See references in Opinion of the District Judge in the instant case [R. 13, 14]. Accordingly, the appellant's contention that the warrant of arrest and the warrant of deportation must be entered within three years, is inapplicable to the case at bar.

Turning now to appellant's contention that a border permit would not have been granted to him had he not acquired the status of a lawful resident alien, it is desired to point out first that appellant's references in his opening brief and appendix B to Part 160, Title 8, Code of Federal Regulations, are irrelevant for the reason that codification of the Rules and Regulations of the agencies of the Federal Government was not authorized until June 30, 1937 (Federal Register Act, 50 Stat. 304, 44 U. S. C. 311) and the first edition of Title 8, Code of Federal Regulations, was printed in 1942. Therefore the regulations promulgated in Part 160, Title 8, Code of Federal Regulations were not in effect when the appellant was issued a border permit in 1920 and again in 1925. The regulations in force on the dates last mentioned relating to border crossing identification cards are quoted in this brief. Those regulations did not specifically require that, as a prerequisite to obtaining a border crossing identification card, an alien must establish a prior lawful admission to the United States. However, the Immigration Act of May 26, 1924, which became effective July 1, 1924 (8 U. S. C.

201, annotation 1), provides that no immigrant shall be admitted to the United States unless he has an unexpired Immigration visa (Section 13(a), 8 U. S. C. 213(a)), and the appellant became subject to the provisions of that statute on any re-entry into the United States from Mexico subsequent to July 1, 1924. The same Act provides that in such classes of cases, and under such conditions as may be by regulations prescribed, immigrants who have been *legally* admitted to the United States and who depart therefrom temporarily, may be admitted to the United States without being required to obtain an immigration visa (section 13(b), 8 U. S. C. 213(b)). The regulations (subdivision F, Rule 3, Immigration Rules July 1, 1925), issued pursuant to the statute have been heretofore set out in this brief and provide exemption from visa requirements only for those immigrant aliens who have been previously lawfully admitted to the United States. Appellant concedes that he entered the United States illegally as a deserting seaman in 1915, and he could not, therefore, subsequent to July 1, 1924, qualify under the exemption relieving him from the necessity of presenting an unexpired immigration visa when entering the United States.

Whatever may have occurred at the port of Calexico when the appellant was issued a border crossing identification card in 1925 is unimportant, because the acts of the officers in permitting his re-entry to this country on the basis of that card could not waive the statutory requirement of the Immigration Act of 1924, *supra*, that an immigrant alien must present an unexpired immigration visa when entering the United States unless he is exempt from such presentation by virtue of a previous lawful admission. The United States is neither bound nor

estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *United States v. City and County of San Francisco*, 310 U. S. 16, 60 S. Ct. 749, 84 L. Ed. 1050, reh. den. 60 S. Ct. 1071, 310 U. S. 657, 84 L. Ed. 1420.

On October 15, 1926, appellant was asked by the immigration officials at Calexico to produce his passport, presumably so that any endorsements thereon as to date and place of original admission to the United States might be checked. He responded that his passport was in possession of his wife in Santa Barbara, California, whereas, as he well knew, he had never had a Japanese passport. [Return, Ex. A, pp. 4, 5.] A short time later, on December 29, 1926, at Calexico he averred falsely to the immigration officials that he had been admitted to the United States for permanent residence at Seattle, Washington, on January 22, 1909. [Return, Ex. A, p. 5.] These efforts to deceive the officers force the conclusion that the appellant was well aware of his illegal immigration status in the United States and that he hoped to gain an advantage under the immigration laws by his false statements.

It is desired to reiterate that the appellant, when he last departed to Mexico and re-entered the United States on December 28, 1926, was in possession of an *expired* border crossing identification card. His testimony on this point is here quoted [Return, Ex. A p. 6]:

“Q. Had your border permit at Calexico, Calif., expired at the time of your last entry into the United States at that port on December 28, 1926? A. *My permit was expired long before that* and I was on that date living in Guadalupe, Calif. I had some

business to complete in Mexico and I came down to take care of it that day.” (Italics added.)

Accordingly, appellant’s statement in his opening brief (p. 7) that this Honorable Court is being asked to pass upon an issue of first impression, to wit: whether the general rules laid down by the Courts as to the date of entry governing in deportation proceedings and lack of a limitation of time under the Immigration Act of 1924, *supra*, are equally applicable to an alien who enters the United States with a border permit, is a misleading statement. The facts are clear that the appellant held an *expired* border permit at the time of his last entry, and it is elementary that he could gain no advantage through the possession of an invalid document.

Appellant urges finally that a person who is in possession of a border crossing identification card and makes frequent crossings into foreign, contiguous, territory, has not made an “entry” within the meaning of the immigration laws. This contention is amply answered by the authorities hereinabove quoted on the question of what constitutes an “entry.” This Honorable Court in the case of *Ali v. Haff*, 114 F. (2d) 369, made the following statement:

“Regardless of the date of original entry, however, the governing date is that of the alien’s last entry into the United States no matter for what purpose the alien may have left the country and returned. *Suwa v. Carr*, 9 Cir., 88 F. 2d 119. It follows, therefore, if the alien was actually in Mexico in September 1928, or at any time subsequently to July 1, 1924, regardless of purpose or length of visit, the date of his original entry into the United States prior to that time is unimportant. *Thaman Singh v. Haff*, 9 Cir., 83 F. 2d 679.”

Opportunity to Secure Counsel.

The appellant does not contend that he was not advised of his right to counsel at the deportation hearing, nor deny that he stated he did not wish to be represented. [Return, Ex. A p. 1 and R. 37.] It is urged instead that the circumstances were such that he had no opportunity to secure counsel even if he had desired to do so. This argument is analogous to that made in the case of *Kishan Singh v. Carr*, 9th Cir., 88 F. (2d) 672, wherein it was contended that the hearing was unfair because the alien, although offered the opportunity to cross-examine certain witnesses for the government, declined to do so because he was financially unable to take advantage of such opportunity. The same argument might be made in any case in which an alien, because of financial circumstances, was not disposed to employ counsel and waived representation. If we adopt appellant's view, an undesirable alien who waived representation at his hearing, could compel endless delays in the attempt of the Government to expel him from its shores.

Appellant's deportation hearing was conducted at a detention facility operated by the Immigration and Naturalization Service, located at Fort Lincoln, four miles from the city of Bismarck, the capital of North Dakota. The population of the city of Bismarck, according to the 1940 official census of the U. S. Bureau of Census was 15,496, and doubtless there were attorneys there available to appellant within his financial means. [R. 48, 49, 50.] Had the appellant expressed a desire to be represented by counsel, he would have been afforded ample time within which to contact any attorney of his choosing or other person of good character. The deportation hearing clearly reflects that the appellant was advised of his right to be

represented by an attorney or other person of good moral character; that he replied in the negative when asked if he wished to be represented; and that he asserted his willingness to proceed with the hearing. [Return, Ex. A, p. 1.] At the conclusion of the hearing, appellant was asked whether he had any further statements to make or questions to ask, and he responded in the negative. [Return, Ex. A p. 13.] He acknowledged that he had thoroughly understood the interpreter during the hearing. [Return, Ex. A p. 13.] Appellant filed written exceptions [Resp. Ex. A, see footnote 2, *supra*], to the findings, conclusions, and order of the presiding inspector, and did not complain then of a violation of his rights or a lack of "opportunity" to secure the services of counsel. In fact, it can be said that appellant had counsel at this stage of the proceedings, because the exceptions, so he testifies, were written for him by a fellow detainee, a Mr. Fuji. [R. 47.] The exceptions are intelligently and ably prepared and contain a strong sympathetic plea. Moreover, and of great importance, *the facts of this case are not in controversy.*

A proceeding to deport an alien who was advised that he was entitled to be represented by counsel but refused to engage counsel was not unfair.

U. S. ex rel. Di Constanzo v. Uhl, 6 F. Supp. 791;

U. S. ex rel. Medich v. Burmaster, 8th Cir., 24 F. (2d) 57.

The holding of a deportation hearing in a prison or other place of confinement does not constitute an unfair hearing.

Rousseau v. Weedin, 9th Cir., 284 Fed. 565, at page 566 states:

“The appellant contends that he was deprived of a fair hearing, in that he was confined in the state penitentiary at the time thereof. We can find in that fact no implication that the hearing was unfair. It is true that the appellant was not represented by an attorney, but was advised of his right to counsel, and repeatedly was asked if he desired an attorney, and always answered in the negative.”

U. S. ex rel. Wlodinger v. Reimer, 2d Cir., 103 F. (2d) 435, at page 436, states:

“On the issue of fair hearing the appellant complains that he was examined by the immigrant inspectors while in prison and without counsel. * * * The fact that the hearing was held in prison did not render it unfair. The appellant was given the chance to have counsel present.”

U. S. ex rel. Bilokumsky v. Tod, 44 S. Ct. 54, 57, 263 U. S. 149, 157, 68 L. Ed. 221, at page 57 (263 U. S. 149, 156, 157):

“The argument is that if a judgment of deportation is to rest upon admissions attributable to the person to be deported, the admissions must have been made by him as a free agent and under circumstances which raise no doubt whether they were in fact made. Deportation is a process of such serious moment that on all controverted matters the executive officers should consider the evidence with close scrutiny. But here there was no denial of alienage; and a landing certificate was introduced by the Government which, when connected with the statement in Bilokumsky's examination, tended in some respects to corroborate

it. Moreover, the statement that one is an alien is not the confession of a crime. Except in case of Chinese, or other Asiatics, alienage is a condition, not a cause, of deportation. So far as appears, there was nothing in the circumstances under which Bilokumsky was examined which would have rendered his answer inadmissible even in a criminal case. *The mere fact that it was given while he was in confinement would not make it so.*" (Italics added.)

Conclusion.

Under the law and the decisions it is manifest that the appellant made an "entry" into the United States at the port of Calexico, California, on December 28, 1926, within the meaning of the immigration laws. The fundamental principles that inhere in due process of law were observed during the hearing afforded appellant to show cause why he should not be deported, and the Attorney General has found that the evidence sustains the charges in the warrant of arrest and has ordered his deportation. The decision of the Court below is correct and should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

RONALD WALKER,
Assistant U. S. Attorney;

ROBERT E. WRIGHT,
Assistant U. S. Attorney;
Attorneys for Appellee.

BRUCE G. BARBER,
Chief, Adjudication Division,
Immigration and Naturalization Service,
On the Brief.

No. 11267

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. C. and AGNES GRAHAM, doing business as
GRAHAM SHIP REPAIR CO.,
Respondents.

Transcript of Record

Upon Petition for Enforcement of Order of the
National Labor Relations Board

FILED

JUL 5 1946

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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BOARD'S EXHIBIT No. 1-A

United States of America
Before the National Labor Relations Board
20th Region

Case No. 20-C-1304

In the Matter of—

W. C. and AGNES B. GRAHAM, d/b/a
GRAHAM SHIP REPAIR CO.,

and

EAST BAY UNION OF MACHINISTS,
LOCAL 1304, C.I.O.

FIRST AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that W. C. and Agnes B. Graham, d/b/a Graham Ship Repair Co., at 501 1st Street (Foot of Washington), Oakland, Calif., employing 125 workers in ship repair, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) and (5) of said Act, in that on or about January 25, 1945, it, by its officers, agents, and employees signed a closed shop contract with the Bay Cities Metal Trades Council allegedly covering all its employees including machinist employees at its Oakland, California, yard at a time when all its machinist employees were members of and represented by East Bay Union of Machinists, C.I.O.

By signing said contract and by proceeding to enforce the provisions thereof, it, by its officers, agents, and employees, discriminated in regard to hire and tenure of employment and terms and conditions of employment of its machinist employees, namely, Frank Schaffer, Jim Potter, Elga Ashcraft, Gustov Berness, Tom Wright, B. F. Clark, Jim H. Clark, Bill Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis Whatley, Lloyd M. Lee.

On or about January 25, 1945, and at all times thereafter, it, by its officers, agents and employees refused to bargain collectively with the authorized representatives of East Bay Union of Machinists, C.I.O., a labor organization chosen by a majority of its machinist employees at its Oakland, California, yard for collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

On or about January 25, 1945, the Company's machinist employees named above ceased work as a consequence of the Company's unfair labor practices.

By the acts set forth in the paragraphs above, by threats to lock out C.I.O. machinists, and by replacing C.I.O. machinist members with members of unions affiliated with Bay Cities Metal Trades Council, and by other acts and conduct, it, by its officers, agents, and employees interfered with, restrained, and coerced its employees in the exercise of the

rights guaranteed in Section 7 of the Act in violation of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

EAST BAY UNION OF MACHINISTS,
LOCAL 1304, C.I.O.

By /s/ JAMES P. SMITH,

Business Agent, 560 11th Street, Oakland, Calif.

Subscribed and sworn to before me this 2nd day of March, 1945, at San Francisco, California.

/s/ WALLACE E. ROYSTER,
Attorney, 20th Region.

BOARD'S EXHIBIT No. 1-B

[Title of Board and Cause.]

COMPLAINT

It having been charged by East Bay Union of Machinists, Local 1304, C.I.O., Oakland, California, hereinafter called the Union, that W. C. and Agnes B. Graham, co-partners doing business as Graham

Ship Repair Co., Oakland, California, hereinafter called respondents, have engaged in and are now engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act, the National Labor Relations Board, by the Regional Director for the Twentieth Region, as agent for the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations—Series 3, as amended, Article IV, Section 1, hereby alleges the following:

I.

Respondents, W. C. and Agnes B. Graham, are and at all times herein mentioned have been co-partners engaged, under the trade name of Graham Ship Repair Co., in the operation of a yard in Oakland, California, for the repair and conversion of seagoing vessels under contracts with the United States Navy, United States Army, and the War Shipping Administration. All of the ships thus repaired and converted by respondents are used for the transportation of passengers and materials in interstate and foreign commerce.

II.

Respondents, during the course and conduct of their business cause, and continuously have caused, large quantities of machinery, machine parts and supplies to be purchased and transported in interstate commerce from and through States of the United States other than the State of California to their ship repair yard in Oakland.

III.

The Bay Cities Metal Trades Council, herein called the Council, is and at all times herein alleged, has been a labor organization composed of a number of union locals chartered by international labor organizations affiliated with the American Federation of Labor and is a labor organization within the meaning of Section 2, subdivision (5), of the National Labor Relations Act.

East Bay Union of Machinists, Local 1304, chartered by United Steelworkers of America, is affiliated with the Congress of Industrial Organizations and is a labor organization within the meaning of Section 2, subdivision (5), of the National Labor Relations Act.

IV.

In order to insure to the employees of respondents the full benefit of their right to self organization and otherwise to effectuate the policies of the Act, the following described group of employees constitutes a unit appropriate for the purposes of collective bargaining with respondents in respect to rates of pay, wages, hours of employment, or other conditions of employment:

(1) All machinists in the Oakland Yard of respondents specifically including machinist helpers, machinist specialists, machinist apprentices, and machinist trainees but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

V.

On or about January 5, 1945, and at all times thereafter, a majority and in fact all of the employees in said unit had designated the Union as their representative for purposes of collective bargaining with respondents and on that date and at all times since the Union has by virtue of Section 9 (a) of the National Labor Relations Act been the exclusive representative of all employees in such unit for the purposes of collective bargaining with respondents in respect to rates of pay, wages, hours of employment, or other conditions of employment.

VI.

On or about January 5 and 6, 1945, and on various dates thereafter the Union, as the exclusive representative of all employees in the unit described in Paragraph IV, above, requested respondents to bargain collectively in respect to rates of pay, wages, hours of employment and other conditions of employment. On said dates, and at all times thereafter, and particularly on or about January 13, 1945, respondents refused, and still refuse to bargain collectively with the Union as such representative.

VII.

On or about January 13, 1945, respondents by their officers, agents, and employees signed a collective bargaining agreement with the Council which respondents and the Council claimed and still claim covers all production and maintenance employees of respondents including machinist employees in the unit described in paragraph IV, above, and

which requires membership in unions affiliated with the Council as a condition of employment for all employees covered thereby. At the time of signature of said contract, none of the employees in the unit described in paragraph IV, above, had designated the Council as his representative for the purposes of collective bargaining. Furthermore, at the time of signature of said contract, the Council was not the designated bargaining representative of a majority of respondents' employees in the unit covered by the agreement.

VIII.

By reason of all the matters alleged in paragraphs IV, V, VI, VII, the contract referred to in paragraph VII is unlawful and void insofar as it covers or purports to cover employees in the unit described in paragraph IV hereof.

IX.

On, or about January 25 and 26, 1945, respondents urged, persuaded, and warned all its employees in the unit described in paragraph IV, above, named in Appendix A attached hereto to become and remain members of a labor organization affiliated with the Council, which organization was not the representative of said employees within the meaning of Section 9 (a) of the Act, and it threatened said employees with loss of employment if they refused or failed to become and remain members of said labor organization. Respondents further informed both its machinist-employees described in paragraph IV, above, and representatives of the Union that

from and after January 26, 1945, only members of unions affiliated with the Council would be employed by respondents in the unit described in paragraph IV, above, and all Union members were to be and would be replaced by members of unions affiliated with the Council. On January 25 and 26, 1945, respondents replaced all employees in the unit described in paragraph IV, above, with members of unions affiliated with the Council (thereby terminating the employment of all) employees within the unit described in paragraph IV, solely because of their membership in the Union.

X.

Because of, and as a result of the unfair labor practices of the respondents described in paragraph VI, VII, and IX, above, the employees in the unit described in paragraph IV, engaged in a strike and all such employees ceased work on or about January 25, 1945. The said strike has continued from January 25, 1945, down to and including the date of issuance of this complaint and at the date hereof is now in progress and is a current labor dispute within the meaning of Section 2, subdivisions (3) and (9), of the Act and the participants therein are employees of the respondents within the meaning of Section 2, subdivision (3), of the Act.

XI.

On, or about February 14, and February 18, 1945, and on several occasions thereafter, the Union, acting on behalf of said employees who were on strike,

requested respondents to reinstate said striking employees to positions held by them before the strike. Respondents, on said dates, and at all times thereafter, refused to reinstate said striking employees or any of them to their former or substantially equivalent positions solely because of their membership in the Union and their participation in said strike.

XII.

By all of the acts of respondents, their officers, agents, and employees, as set forth in paragraphs VI, VII, IX, X, and XI, above, and by each of said acts, the respondents have interfered with, coerced, and restrained their employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all of said acts, and by each of them, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8, subdivision (1), of the Act.

XIII.

By all of the acts of respondents, their officers, agents, and employees, as set forth in paragraphs IX, X, XI, above, and by each of said acts, the respondents have discriminated and are discriminating in regard to the hire and tenure of employment of their employees and did thus discourage and are discouraging membership in the Union, and did thereby engage in, and are thereby engaging in, unfair labor practices within the meaning of Section 8, subdivision (3) of the Act.

XIV.

By all of the acts of respondents, their officers, agents, and employees, as set forth in paragraph VI and VII, above, the respondents refused on request to bargain with the designated bargaining representative of their employees in an appropriate unit, as described in paragraphs IV and V, above, and did thereby engage, and are thereby engaging in unfair labor practices within the meaning of Section 8, subdivision (5) of the Act.

XV.

The activities of the respondents, their officers, agents, and employees, as set forth in paragraphs VI, VII, IX, X and XI, above, occurring in connection with the operations of the respondents as described in paragraphs I and II, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and with foreign countries, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XVI.

The aforesaid acts of the respondents, their officers, agents and employees, as set forth in paragraphs VI, VII, IX, X, XI, XII, XIII, XIV, and XV, constitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3) and (5), and Section 2, subdivisions (6) and (7), of the Act.

Wherefore the National Labor Relations Board,

on the 3rd day of March, 1945, issues its complaint against W. C. and Agnes B. Graham, respondents herein.

[Seal] /s/ JOSEPH E. WATSON,
Region Director, 20th Region.

APPENDIX A

Frank E. Shaffer, James E. Potter, Elga O. Ashcraft, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis H. Whatley, Lloyd M. Lee.

BOARD'S EXHIBIT No. 1-C

NOTICE OF HEARING

Please Take Notice that on the 15th day of March, 1945, at 10 o'clock in the forenoon in Room 449, Post Office Building, 7th and Mission Streets, San Francisco, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the undersigned Regional Director, acting in this matter as agent of the National Labor

Relations Board, an answer to the said Complaint within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the Twentieth Region on this 3rd day of March, 1945.

[Seal] /s/ JOSEPH E. WATSON,
Regional Director, National
Labor Relations Board.

(Affidavit as to Service attached.)

BOARD'S EXHIBIT No. 2

[Title of Board and Cause.]

FIRST AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that W. C. and Agnes B. Graham, d/b/a Graham Ship Repair Co., at 501 1st Street (Foot of Washington), Oakland, Calif., employing 125 workers in ship repair, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) and (5) of said Act, in that

on or about January 25, 1945, it, by its officers, agents, and employees signed a closed shop contract with the Bay Cities Metal Trades Council allegedly covering all its employees including machinist employees at its Oakland, California, yard at a time when all its machinist employees were members of and represented by East Bay Union of Machinists, C.I.O.

By signing said contract and by proceeding to enforce the provisions thereof, it, by its officers, agents and employees, discriminated in regard to hire and tenure of employment and terms and conditions of employment of its machinist employees, namely, Frank Schaffer, Jim Potter, Elga Ashcraft, Gustov Berness, Tom Wright, B. F. Clark, Jim H. Clark, Bill Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis Whatley, Lloyd M. Lee.

On or about January 25, 1945, and at all times thereafter, it, by its officers, agents and employees refused to bargain collectively with the authorized representatives of East Bay Union of Machinists, C.I.O., a labor organization chosen by a majority of its machinist employees at its Oakland, California, yard for collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

On or about January 25, 1945, the Company's machinist employees named above ceased work as a consequence of the Company's unfair labor practices.

By the acts set forth in the paragraphs above, by threats to lock out C.I.O. machinists, and by replacing C.I.O. machinist members with members of unions affiliated with Bay Cities Metal Trades Council, and by other acts and conduct, it, by its officers, agents and employees interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7, of the Act in violation of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

This charge was filed by an individual who also filed an affidavit attesting that he is an employee of the employer concerned at the repair yard involved. I am satisfied that the charging individual is an employee as he represents.

/s/ JOSEPH E. WATSON,

Regional Director.

Subscribed and sworn to before me this 7th day of March, 1945, at San Francisco, California.

/s/ WALLACE E. ROYSTER,

Attorney, 20th Region.

(Exhibit No. 2 (a) Affidavits as to Service attached.)

BOARD'S EXHIBIT No. 4

United States of America

Before the National Labor Relations Board

Twentieth Region

Case No. 20-C-1304

In the Matter of—

W. C. and AGNES B. GRAHAM, doing business as GRAHAM SHIP REPAIR CO.,

and

EAST BAY UNION OF MACHINISTS,
LOCAL 1304, C.I.O.,

and

BAY CITIES METAL TRADES COUNCIL,
A. F. of L., Party to the Contract.

ANSWER TO COMPLAINT

Comes now Bay Cities Metal Trades Council, A. F. of L., party to the contract, and answering the complaint issued in the above-entitled matter, admits, denies and alleges:

I.

Answering Paragraph I of the said complaint, said Council is without knowledge with respect to the allegations in said paragraph contained.

II.

Answering Paragraph II of the said complaint,

said Council is without knowledge with respect to the allegations in said paragraph contained.

III.

Answering Paragraph III of the said complaint, said Council admits the allegations in said paragraph contained.

IV.

Answering Paragraph IV of the said complaint, said Council denies the allegations in said paragraph contained.

V.

Answering Paragraph V of the said complaint, said Council denies the allegations contained in said paragraph but admits that some undetermined number of employees of respondent had on or about January 5, 1945, and thereafter, designated the East Bay Union of Machinists, Local 1304, C.I.O., as their collective bargaining representative.

VI.

Answering Paragraph VI of the said complaint, said Council is without knowledge with respect to the allegations in said paragraph contained.

VII.

Answering Paragraph VII of the said complaint, said Council denies the allegations in said paragraph contained except that it admits that there is in effect and has been in effect at all times mentioned in the complaint a collective bargaining agreement between the said Council and respondent which covers all production and maintenance employees of respond-

ent, including machinists, machinists helpers, machinists specialists, machinists apprentices and machinists trainees, and that the said agreement requires membership in unions affiliated with the Council as a condition of employment for all employees covered thereby.

VIII.

Answering Paragraph VIII of the said complaint, said Council denies the allegations in said paragraph contained.

IX.

Answering Paragraph IX of the said complaint, said Council is without knowledge with respect to the allegations in said paragraph contained and in connection with the allegations of said paragraph said Council alleges that at all times mentioned in complaint herein, said Council has been and still is the representative of all production employees of respondent, including those in the machinists category set forth in Paragraph IV of the said complaint within the meaning of Section 9-a of the Act.

X.

Answering Paragraph X of the said complaint, said Council denies the allegations contained in said paragraph but admits that certain employees of respondent did strike on or about the 25th day of January, 1945.

XI.

Answering Paragraph XI of said complaint, said Council is without knowledge with respect to the allegations in said paragraph contained.

XII.

Answering Paragraphs XII, XIII, XIV, XV, and XVI of the said complaint, said Council denies the allegations in said paragraphs contained.

/s/ CHARLES J. JANIGIAN,

Attorney for Bay Cities Metal Trades Council,
A. F. of L., Party to the Contract.

State of California,
City and County of San Francisco—ss.

Thomas A. Rotell, being first duly sworn, deposes and says:

That he is the assistant secretary of the Bay Cities Metal Trades Council, A. F. of L., party to contract; that he is making this verification for and on behalf of said Council; that he has read the foregoing Answer to Complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

/s/ THOMAS A. ROTELL.

Subscribed and sworn to before me this 16th day of March, 1945.

/s/ JOHN PAUL JENNING,

Regional Attorney, N.L.R.B.,
28th Region.

[Title of Board and Cause.]

EXCEPTIONS OF BAY CITIES METAL
TRADES COUNCIL TO INTERMEDIATE
REPORT OF TRIAL EXAMINER

The Bay Cities Metal Trades Council, hereinafter referred to as the Council, party to the contract above named, hereby files the following exceptions to the intermediate report of the trial examiner filed in the above-entitled proceedings, as follows, to-wit:

I.

The Council excepts to the ruling of the trial examiner herein denying the motion made by its counsel at the conclusion of the hearings held in the above-entitled matter to dismiss the complaint issued in the above proceedings upon the grounds stated at the time of the making of said motion.

II.

The Council excepts to the following findings and each of them contained in the said intermediate report of the said trial examiner on the ground that the said findings are unsupported by the evidence and that the said findings and each of them are contrary to law:

1. The finding appearing in lines 9 and 10 on page 4 of said intermediate report as follows:

“The Council, however, offered no evidence in support of its contention.”

2. Commencing with the words “In a matter” appearing in line 18 to and including the words

“East Bay shipyards involved” appearing in lines 34 and 35 on page 5 of said intermediate report.

3. The paragraph commencing with line 37, page 5, to the end of said paragraph at line 47, page 5, of said intermediate report.

4. The paragraph commencing with line 52, page 5, to the end of said paragraph at line 62, page 5.

5. Portion of said intermediate report commencing with the words “the respondent” appearing at line 21, page 6, to and including the words “industrial organization” appearing in line 27, page 6.

6. All of footnote #6 appearing on pages 6 and 7 of said intermediate report.

7. The following finding appearing in lines 9 and 10, page 7, of said intermediate report:

“On the latter date, Lehaney and Graham instructed Close to request Smith to prepare a contract covering the machinists.”

8. The paragraph commencing with line 27, page 7, to the end of said paragraph appearing in line 42, page 7.

9. Commencing with line 44, page 7, to the end of line 29, page 8.

10. Commencing with line 34, page 8, and ending at line 44, page 8.

11. The paragraph commencing at line 46, page 8, to the end of said paragraph appearing at line 52, page 8.

12. The finding appearing on page 9, lines 5 and 6, as follows:

“At the end of the day shift all the machinists belonging to the Union were discharged.”

13. The paragraph commencing with line 8, page 9, and ending at line 20, page 9.

14. The paragraph commencing with line 22, page 9, to the end of said paragraph appearing in line 28, page 9.

15. The paragraph commencing at line 32, page 9, to the end of said paragraph in line 37, page 9.

16. The portion of the intermediate report entitled “The Remedy,” commencing with line 41, page 9, and ending at line 19, page 10.

17. The portion of the intermediate report entitled “Conclusions of Law” commencing at page 10 except as to a finding that the East Bay Union of Machinists and the Bay Cities Metal Trades Council are labor organizations within the meaning of Section 2(5) of the Act.

18. The portion of said intermediate report entitled “Recommendations”, commencing at line 25, page 11, to the end of said intermediate report.

Dated: July 3, 1945.

/s/ CHARLES J. JANIGIAN,

Attorney for Bay Cities Metal Trades Council,
A. F. of L.

United States of America
Before the National Labor Relations Board

Case No. 20-C-1304

In the Matter of

W. C. and AGNES GRAHAM, doing business
as GRAHAM SHIP REPAIR CO.

and

EAST BAY UNION OF MACHINISTS,
LOCAL 1304, C. I. O.

and

BAY CITIES METAL TRADES COUNCIL,
A. F. of L., Party to the Contract.

DECISION AND ORDER

On June 8, 1945, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondents had engaged in and were engaging in certain unfair labor practices affecting commerce and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Council filed exceptions to the Intermediate Report and a supporting brief. Pursuant to notice served on all parties, the Board heard oral argument at Washington, D. C., on August 14, 1945.

The Council and the Union participated in the oral argument; the respondents did not appear.

The Board has reviewed the rulings made by the Trial Examiner at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Council's exceptions and brief, and the entire record, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the additions noted below:

1. The Trial Examiner found (1) that on and after January 2, 1945, the Union represented a majority of the employees in an appropriate unit of machinists; (2) that the respondents did not intend to have the machinists covered by the closed-shop contract with the Council, dated January 2, 1945, and that the Council was aware of the respondents' position in that regard; and (3) that the closed-shop contract with the Council was not a valid defense to the respondents' refusal to bargain with the Union on behalf of the machinists on and after January 17, 1945, and to the respondents' discrimination in regard to the hire and tenure of employment of the machinists on January 25, 1945. We agree.

2. The Council asserts that the closed-shop contract with the respondents, dated January 2, 1945, was intended by the parties to cover all production and maintenance employees, including machinists. But even assuming, *arguendo*, the correctness of the Council's contention and possible error by the

Trial Examiner in resolving this issue, we find that, under the circumstances of this case, a unit of production and maintenance employees, including machinists, is inappropriate. It is conceded that the Council did not represent a majority of the machinists, if regarded as a separate unit.

At the time of the execution of the contract in question, and since at least 1936, the machinists employed in ship repair yards located in Alameda County, where the respondents' yard is situated, bargained separately and apart from other production and maintenance employees.¹ With the exception of one or two yards, all these ship repair yards operated, and now operate, under the Master Ship Repair Contract with the Council of April 1, 1940, covering production and maintenance employees, exclusive of machinists, and under separate contracts with the Union, covering machinists. The record further shows that collective bargaining at the respondents' yard, from the time of its establishment in 1942 until the respondents took possession in January, 1945, was conducted on a two-unit basis, with the Union representing the machinists and the Council representing crafts other than machinists. On January 1, 1945, there were outstanding at the yard two closed-shop contracts, one with the Union covering machinists and other with the Council incorporating the terms of the Master Ship Repair Agreement of April 1, 1940,

¹See Matter of Bethlehem-Alameda Ship Yards, Inc., 53 N. L. R. B. 999.

covering all other crafts.² When the respondents took possession of the yard pursuant to their lease, they contemplated, and in fact made, no change in the nature of the business conducted by their predecessors Judson and Johnson, which was ship repairing.³ Nor did the respondents contemplate, or effect, any substantial change in the personnel of the yard.⁴

²Under their lease, the respondents assumed no obligations to carry out the terms of these contracts.

³We find no merit in the Council's contention that the respondents' predecessors were engaged in the business of new ship construction as distinguished from ship repair work. Johnson, former general manager of Judson, testified that Judson was primarily engaged in "conversion" of the vessels that had been to sea for the use of the Navy, and this work was considered repair work, and that it was paid for at the repair rate. In its brief in support of the exceptions to the Intermediate Report, the Council admitted that Judson as well as Johnson operated the Yard under the Master Ship Repair Agreement with the Council of April 1, 1940, thus in effect conceding that Judson and Johnson were engaged in ship repair business. Upon the entire record, we find that Judson as well as Johnson was engaged in the ship repair business.

⁴The respondents took over a number of employees of Johnson including three machinists and put them on their pay roll on January 2 and 3. Either before January 1 or shortly thereafter the respondents entered into an agreement with the Navy pursuant to which their source of labor supply was limited mainly to the former employees of Judson. Immediately thereafter, the respondents began hiring men formerly employed by Judson.

Upon the entire record, and particularly in view of the history of collective bargaining on a two-unit basis, the fact that the respondents neither contemplated nor effected any substantial changes in the nature or personnel of the business conducted by their predecessors, and the fact that the machinists had not changed their affiliation and the respondents had no reason to believe that any change in affiliation had occurred or would soon occur, we find that a unit composed of all production and maintenance employees, including machinists, was, and is, inappropriate within the meaning of Section 9 of the Act.⁵ Whatever majority the Council may have had in such an over-all unit, it admittedly had none within a machinists' unit standing alone. Since the unit covered by the closed-shop contract, dated January 2, 1945, is inappropriate, the contract failed to satisfy the Proviso to Section 8 (3) of the Act and hence can serve as no defense to the respondents' refusal to bargain with the Union on behalf of machinists and to the respondents' discriminatory treatment of the machinists.

3. The Council also contends that the 14 machinists were not discharged, as the Trial Examiner found, but that they were given an opportunity to remain in the employ of the respondents upon con-

⁵See Matter of Howard B. Jones Co., 55 N. L. R. B. 1176; Matter of Dain Manufacturing Co., 52 N. L. R. B. 1034; cf. Matter of South Carolina Granite Co., 58 N. L. R. B. 1448; and Matter of Synerco Machine Co., Inc., 62 N. L. R. B., No. 126.

dition that they join the A. F. L. union. Since, as we have found, the closed-shop contract did not satisfy the Proviso to Section 8 (3) of the Act, the conditioning of further employment of the machinists upon their joining the A. F. L. union is as direct a violation of the Act as their outright discharge for being members of the Union. We find no merit in the Council's contention.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, W. C. and Agnes Graham, doing business as Graham Ship Repair Co., Oakland, California, and their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, or in any other labor organization of their employees, by laying off, discharging or refusing to reinstate any of their employees, by refusing to employ any member of the said labor organization, by conditioning further employment upon membership in Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of their employment;

(b) Recognizing Bay Cities Metal Trades Coun-

cil, affiliated with the American Federation of Labor, as the exclusive representative of the employees in the appropriate unit described in paragraph 2 (c) of this Order;

(c) Giving effect to their contract, dated January 2, 1945, with the Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or to any extension, renewal, revision, modification or supplement thereof or to any superseding contract which may now be in effect, insofar as it affects their employees in the appropriate unit described in paragraph 2 (c) of this Order;

(d) Refusing to bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of their employees in the appropriate unit described in paragraph 2 (c) of this Order, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(e) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form labor organizations, to join or assist East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which

the Board finds will effectuate the policies of the Act:

(a) Offer to Frank E. Shaffer, James E. Potter, Elga O. Ashcraft, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis H. Whatley, Lloyd M. Lee immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges;

(b) Make whole the employees named in paragraph 2 (a) of this Order for any loss of pay they may have suffered by reason of the respondents' discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from the date of the respondents' discrimination against him to the date of the respondents' offer of reinstatement, less his net earnings during such period;

(c) Upon request, bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all the respondents' machinists, machinist helpers, machinist specialists, machinist apprentices, and machinist trainees, but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(d) Post in their ship repair yard at Oakland, California, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the respondents' representative, be posted by them immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Region Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps the respondents have taken to comply herewith.

Signed at Washington, D. C., this 12th day of September, 1945.

[Seal] PAUL M. HERZOG

Chairman

JOHN M. HOUSTON

Member

National Labor Relations
Board

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate

the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist East Bay Union of Machinists, Local 1304, C. I. O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All machinists of W. C. and Agnes Graham, doing business as Graham Ship Repair Co., including machinist helpers, machinist specialists, machinist apprentices, and machinist trainees but excluding all supervisory employees with authority to hire, promote, discharge, discipline, otherwise effect

changes in the status of employees or effectively recommend such action.

The employees to be offered reinstatement with back pay are: Frank E. Shaffer, James E. Potter, Elga O. Ashcraft, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis H. Whatley, and Lloyd M. Lee.

We will not give effect to our contract, dated January 2, 1945, with the Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or to any extension, renewal, revision, modification or supplement thereof or to any superseding contract which may now be in effect, insofar as it affects our employees in the unit above described.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

W. C. and AGNES GRAHAM,
doing business as Graham
Ship Repair Co., (Em-
ployer)

Dated.....

By

(Representative)

Note: Any of the above-named employees presently serving in the armed forces of the United States will be offered full reinstatement upon application in accordance with the Selective Service Act after discharge from the armed forces.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

Mr. Wallace E. Royster, for the Board.

Mr. Bernard B. Stimmel, of San Francisco, Calif., for the respondents.

Mr. J. H. Sapiro, of San Francisco, Calif., for the Union.

Mr. Charles J. Janigian, of San Francisco, Calif., for the Council.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon a first amended charge duly filed on March 2, 1945, by East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, herein called the Union, the National Labor Relations Board, by the Regional Director for the Twentieth Region (San Francisco, California), issued its complaint, dated March 3, 1945, against W. C. Graham and Agnes Graham, doing

business as Graham Ship Repair Co., herein called the respondents, alleging that the respondents, and each of them, had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and the first amended charge, accompanied by notice of hearing thereon, were duly served upon the respondents and Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, herein called the Council, a party to the contract.

With respect to unfair labor practices, the complaint, as amended at the hearing, alleges in substance that the respondents (1) on or about Jan. 5, Jan. 6, and Jan. 13, 1945, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of their employees in a certain appropriate unit,¹ although a majority of the employees in the said unit had designated the Union as their representative for such purpose; (2) on or about January 13, 1945, entered into a

¹The unit alleged in the complaint to be appropriate comprises all the respondents' machinists, machinist helpers, machinist specialists, machinist apprentices and machinist trainees, but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action. The persons in the machinist category are the only ones involved in this proceeding.

written collective bargaining contract with the Council, although at the time of the execution of said agreement the Council had not been designated the exclusive representative of the employees; (3) on or about January 25, 1945, urged, persuaded, and warned their employees to become members of the Council, and threatened their employees with discharge if they failed or refused to become and remain members of the Council; (4) on or about January 25, 1945, discharged 14 named employees² because they failed and refused to become members of the Council; and (5) by the foregoing acts, interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act. The respondents filed to answer. The answer filed by the Council avers, inter alia, that during all times material herein, the respondents and the Council have had a valid collective bargaining agreement covering all the employees of the respondents, including those in the unit alleged in the complaint to be appropriate.

Pursuant to notice, a hearing was held from March 15 to March 21, 1945, inclusive, at San Francisco, California, before the undersigned, Howard Myers, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent,

²Frank E. Shaffer, James E. Potter, Elga O. Ashcraft, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis H. Whatley, and Floyd M. Lee.

the Union, and the Council were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues was afforded all parties. At the conclusion of the hearing, Board's counsel moved to conform the pleadings to the proof with respect to minor inaccuracies, typographical errors, misspelling, and the like. The motion was granted without objection. Counsel for the Council then moved to dismiss the complaint for lack of proof. Decision thereon was reserved. The motion is hereby denied. Oral argument, in which counsel for the respective parties participated, was heard at the conclusion of the taking of the evidence and is part of the record. The parties were granted leave to file briefs with the undersigned on or before April 4, 1945. A brief has been received from counsel for the Union.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes, in addition to the above, the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

The respondents' ship repair yard is located at 501 First Street, Oakland, California, where they are engaged in repairing and reconverting combat, landing, and transport ships for the United States Navy and cargo and other vessels for the War Shipping Administration. During January and February, 1945, the respondents' gross income from their

ship repair business aggregated approximately \$200,000. About 15 or 20 per cent of the ships repaired and reconverted during those months came to the respondents' yard from points outside of the State of California. During the same period, the respondents' purchases amounted to approximately \$60,000; about 15 or 20 per cent thereof came from points outside the State of California. The respondents' estimated business for the current year will aggregate about \$2,500,000.

The respondents concede that the Board has jurisdiction in this matter.

II. THE ORGANIZATIONS INVOLVED

East Bay Union of Machinists, Local 1304, is a labor organization affiliated with the Congress of Industrial Organizations, and Bay Cities Metal Trades Council is a labor organization affiliated with the American Federation of Labor. Both organizations admit to membership employees of the respondents.

III. THE UNFAIR LABOR PRACTICES

A. Background

The property upon which the respondents' yard is located is owned by the Port Authority of the City of Oakland, California. In the Spring of 1943, Judson-Pacific War Industries, herein called Judson, leased the property and erected thereon a ship repair yard. In November, 1944, Judson sold its equipment to Walter W. Johnson Company, herein called Johnson. However, Johnson did not take

possession until December 19, because it was not until then that Judson finished the work it was doing on the ships in the yard. Sometime in the latter part of December, Johnson leased the equipment to the respondents who took possession and commenced business on January 2, 1945. From December 19 to January 2, Johnson had in its employ a superintendent, an assistant superintendent, three machinists, who, during this period, were engaged in maintenance work only, and several clerical employees. These persons were in the employ of Judson when Johnson took over the yard on December 19. When the respondents commenced work on January 2, they had eight employees, including the three machinists formerly in the employ of both Judson and Johnson. With increased business the number of employees increased. The following table sets forth the approximate number of employees during the first 4 weeks of operations:

Week ending Jan. 7: Approximately 50 employees, including 3 machinists.

Week ending Jan. 14: Approximately 153 employees, including 3 machinists.

Week ending Jan. 21: Approximately 182 employees, including 4 machinists.³

Week ending Jan. 28: Approximately 329 employees.⁴

³On January 20, there were four machinists in the respondents' employ.

⁴The record does not show how many machinists were in the respondents' employ subsequent to January 25. On that day, however, there were 18 machinists employed.

B. Interference, Restraint and Coercion; the Refusal to Bargain Collectively

(1) The Appropriate Unit

The complaint alleges that during all times material herein, machinists in the employ of the respondents, including machinist helpers, machinist specialists, machinist apprentices, and machinist trainees, but excluding supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, constituted, and now constitute, a unit appropriate for the purposes of collective bargaining. The answer of the Council denies, in effect, the appropriateness of the alleged unit. At the hearing, the respondents, in effect, took the position that those employed in the machinist category constituted an appropriate unit. This is the unit alleged in the complaint as being appropriate and is the unit which the Union contends is appropriate. On the other hand, the Council contended that all the non-supervisory production and maintenance employees of the respondents constituted an appropriate unit. The Council, however, offered no evidence in support of its contention. Admittedly, the persons in the machinist category comprise generally a highly skilled group of workers. The record discloses that they are identified with a functionally distinct and long established craft. The history of collective bargaining in the shipbuilding industry in the area where the respondents' yard is located lends great weight to

the Board's contention that the persons employed by the respondents in its machinist category constitute a unit separate and apart from the other production and maintenance employees of the respondents. In a matter in which the Union and the Council were parties, the Board had before it this precise question regarding the appropriateness of a unit composed of machinists.⁵ In that case, in reviewing the history of collective bargaining in the area in which the respondents' yard is located, the Board said:

The record in this case discloses that, except for machinists, whose position has been unique, the process of collective bargaining in the San Francisco Bay area shipbuilding industry has proceeded, at least since 1936, on the basis of plant-wide units. In February, 1936, following a strike in the shipyards in this area, a group of American Federation of Labor Unions, acting jointly, entered into a collective bargaining agreement with all the major San Francisco Bay shipyards other than the Bethlehem yards. The agreement, while specifically covering the various occupational classifications in these yards, welders among them, made no reference to machinists. Thereafter beginning in February, 1937, the American Federation of Labor unions, acting now through the Council which signed on their behalf, entered into further and similar agreements with the same shipyard operators, and these con-

⁵In the Matter of Bethlehem-Alameda Shipyard, Inc., et al., 52 N.L.R.B. 999.

tinued in effect until April, 1941. All of these agreements likewise expressly included welding and burning among the covered classifications, but did not purport to cover machinists. Although the Bethlehem yards were not parties to these agreements, there is evidence indicating that the terms of these agreements were informally recognized and observed by them.

In April, 1941, as the result of a conference held under the auspices of the Shipbuilding Stabilization Committee, an agreement, known as the Pacific Coast Shipbuilding Master Agreement, was reached between representatives of the Pacific Coast shipbuilding industry and the Metal Trades Department of the American Federation of Labor to which the Council is affiliated. With the exception of the two Bethlehem companies herein involved, all shipyards in the San Francisco Bay Area are now covered by this Master Agreement. Among those covered is the Bethlehem San Francisco yard, operated under the same management as the Companies herein involved, which on June 28, 1941, after a cross-check conducted by the Regional Director in a stipulated production and maintenance unit, entered with the Council into a contract containing, except for some minor modifications, terms identical to that of the Master Agreement. The Master Agreement explicitly includes welders among the covered classifications.

Although machinists are also covered in the Master Agreement, that agreement in its application to

shipbuilding concerns in the East Bay area shipyards has been construed to exclude employees in this classification from the Council's unit.

Reference has been made to the unique position occupied by machinists in the collective bargaining pattern of the San Francisco Bay Area shipbuilding industry. It has been noted that in the period prior to April 23, 1941, whenever the Council executed agreements with shipyards in this area, machinists were excluded from their scope. During this same period, the Machinists, which claims jurisdiction over machinists in the East Bay Area, and Local 68 of the International Association of Machinists, which claims jurisdiction on the west side of the Bay in the San Francisco area, conducted their own negotiations and entered into contracts independently of the Council. It appears that although the Repair Yard refused to sign any of the contracts which were periodically negotiated by the Machinists with other East Bay shipyards, on the occasion of each such contract a tacit understanding was reached between the Machinists and the foreman of the Repair Yard's machine shop pursuant to which the latter agreed to abide by the terms of the contracts at least with respect to its wage rates. As a consequence of the Master Agreement, a dispute arose between the Council, the Machinists, and East Bay shipyards over the Council's demand that the shipyards hire only AFL machinists. The dispute was ultimately submitted to the then codirector of the Office of Production Management, who ruled that the Council agreement did not cover machinists

in the East Bay Area and that the Machinists were separately entitled to the benefits of the Master Agreement in that area. About a year later, when the same dispute arose anew and a work stoppage was threatened, the matter was referred to the National War Labor Board which has since upheld the Machinists' claim to have machinists cleared through it in the East Bay shipyards involved.

The undersigned finds that the respondents' employees receive the full benefit of the right to self-organization by having a separate and distinct unit composed of persons employed in the machinist category. Therefore, the undersigned finds that all the respondents' machinists, machinist helpers, machinist specialists, machinist apprentices and machinist trainees but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, at all times material herein constitute and now constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. Representation by the Union of a Majority in in the Appropriate Unit

At the hearing, the parties stipulated, and the evidence clearly establishes, that from January 2, 1945, the day when the respondents commenced work in the yard, all the respondents' machinists were members in good standing of the Union. The undersigned accordingly finds that on January 2, 1945,

and at all times thereafter, the Union was the duly designated bargaining representative of a majority of the respondents' employees in the unit heretofore found appropriate. Pursuant to Section 9 (a) of the Act, the Union was, therefore, the exclusive representative of all the respondents' employees in such unit for the purposes of collective bargaining in respect to rates of pay, hours of employment and other conditions of employment.

3. The Refusal to Bargain

In the latter part of December, 1944, the respondents employed Raymond H. Lehaney as their labor relations director. Lehaney at that time was, and still is, the public relations director for the Western Congress of the Teamsters Union, an affiliate of the American Federation of Labor. Not being familiar with the labor situation in the San Francisco area, Lehaney called on several officials of the Teamsters Union for assistance and advice. They told Lehaney that all the shipyards in the San Francisco area were under closed-shop contracts with the American Federation of Labor. On January 2, Lehaney and W. C. Graham, one of the respondents and the active head of the business, called upon an official of the Council. There, according to the testimony of Graham, he and Lehaney discussed a collective bargaining agreement with some of the officials of the Council, but no agreement was signed that day. Lehaney and several Council officials testified that a closed-shop agreement was signed by Lehaney that day, but not while Graham was pres-

ent. The record discloses no other meeting between Lehaney and the Council that day. The date when the agreement was actually signed is of no great importance to the issues involved herein for the respondents agreed at the January 2 meeting to enter into a closed-shop agreement with the Council.⁶ The respondents, however, maintain that it was understood at that meeting that the closed-shop contract was not to cover the machinists for, as the evidence discloses, the parties were well aware of the situation in the area in which the respondents' yard is located with respect to machinists; namely, that all the unionized machinists in that area are members of the Congress of Industrial Organizations.

⁶The contract, dated January 2, 1945, lists the names of the various crafts for whom the Council was entering into the contract and the categories of the persons over whom the named crafts have jurisdiction. The machinists are not mentioned by name therein. What Lehaney signed on that day is the following:

Acceptance of Agreement

It Is Mutually Agreed To by and between the Employer signatory hereto, engaged in Ship Repair work in San Francisco Bay Area and the Bay Cities Metal Trades Council of the American Federation of Labor and its affiliated unions, that the 1940 Bay Cities Metal Trades Council Ship Repair Agreement as amended shall remain in force and effect in accordance with the terms contained herein.

The agreement referred to in the above memorandum is a master agreement, dated April 1, 1940, between the Council and various San Francisco area ship repair companies. This master agreement was amended in 1944. The master agreement and the amended agreement list the names of the crafts for whom the Council was contracting and the cate-

On or about January 5, James P. Smith, the Union's business agent, met with Lehaney and James W. Close, the respondents' general superintendent and general manager, and informed them that all the machinists employed by the respondents were members of the Union and demanded that Lehaney sign an agreement covering these men or continue in effect the contract which the Union had with Judson.⁷ Lehaney replied that he would have to consult with his superiors. Several other demands for a collective bargaining contract covering ma-

gories of the persons over whom the named crafts have jurisdiction. The machinist group is not mentioned in either agreement. The Council argues that a master agreement, dated April 23, 1941, between the Pacific Coast Shipbuilders and Metal Trades Department of The American Federation of Labor, The Council, and various other American Federation of Labor affiliates, including the International Association of Machinists, superseded the 1940 contract and is the contract which is now controlling upon the parties and therefore the parties to the closed-shop agreement in controversy herein are bound by its terms. This contract is between various labor organizations affiliated with American Federation of Labor and various Pacific Coast companies engaged in building new ships. The respondents are not so engaged. Their business is repairing and converting ships. The Council's contention that the respondents are bound by the 1941 ship-building contract is without merit. Moreover, the ship repair contract is confined to the San Francisco area while the new ship contract of 1941 covers the entire Pacific Coast. See *In the Matter of Bethlehem-Alameda Shipyard, Inc. et al.*, 53 N.L.R.B. 999.

⁷Judson was operating under a closed-shop contract with the Union with respect to machinists.

chinists were made by Smith between January 5 and 15. On the latter date, Lehaney and Graham instructed Close to request Smith to prepare a contract covering the machinists.⁸ Close so informed Smith, who replied that he would submit a contract. On January 17, Smith met with Graham, Lehaney and others at which meeting he submitted a contract. Graham and Lehaney refused to examine it or to sign it, stating that they could not enter into an agreement with Smith because of the existing closed-shop agreement with the Council. On several occasions between January 17 and 25, Graham and Lehaney conferred with the Council. These meetings were held solely for the purpose of straightening out the differences that arose between the respondents and the Council with respect to the machinists in the respondents' employ. The respondents maintained at these meetings that the agreement of January 2 did not cover the machinists but the Council maintained that it did. Finally, on January 25, the Council informed the respondents that if they did not replace the Union's machinists with machinists belonging to the Council, it, to quote Close's version of what Lehaney said to him, "would pull the rest of the crafts out of the yard." On January 25, the respondents replaced its machinists with machinists belonging to the Council.

It is clear that the respondents did not intend the agreement with the Council to cover the ma-

⁸According to Close's testimony, Lehaney's instructions were to inform Smith to present a predated contract.

chinists, for the record discloses that Graham sometime after January 2 instructed Lehaney to enter into an agreement with the Council for all the production and maintenance employees except the machinists and instructed Close to enter into an agreement with the Union for the machinists. Lehaney knew that Close was so instructed because Graham wanted Lehaney to handle the contract with the Union and the latter begged off, saying that he could not very well enter into negotiations with the Union because of his official position with the Teamsters Union. Furthermore, the Council was well aware on January 2, that the respondents did not intend the contract between them to cover the machinists. The respondents' position in this regard is clearly set forth in the following colloquy which ensued between counsel for the respondents and the undersigned during oral argument at the conclusion of the taking of evidence herein:

Mr. Stimmel: That Mr. Lehaney received no authority to sign a contract, I think the evidence will show that until around January 6th, at which time he received a limited authority to sign an A.F.L. contract and that Mr. Close was to sign the C.I.O. contract. That the contract which Mr. Lehaney signed, if he did sign it, and he did, exceeded his authority in regard to the C.I.O. machinists.

Trial Examiner Myers: Is it your contention that the contract with the A. F. of L. Council did not cover the machinists at the respondent's operation?

Mr. Stimmel: That the contract which Lehaney

was authorized to sign was the same type of contract that was in the other yards in the East Bay district and that he was instructed specifically at that time that Mr. Close was the authorized agent to sign the C.I.O. contract and that circumstance was brought out in the evidence by the testimony of Mr. Lehaney himself who stated that when he was told to sign a contract with the A.F.L. and the C.I.O., he demurred to it, stated he could not sign a C.I.O. contract because he was a high official of the A. F. of L. and that he suggested Close sign such a contract.

Trial Examiner Myers: But my question is, and I am just thinking out loud when I am discussing this, I have not come to any conclusion whatsoever, as to the facts in the case—is it your contention that the agreement with the Council does not cover machinists?

Mr. Stimmel: Yes. . . .

4. Concluding Findings as to the Refusal to Bargain

When the respondents informed Smith on January 17, that they could not enter into an agreement with the Union because of the then existing agreement with the Council, this reason was but a pretext. As between incurring the consequences of disregarding the obligations to bargain with the Union as imposed by the Act and the economic results that were implicit in the threat of the Council, the respondents have elected to avoid the latter and risk the former. They were forced to make a

choice and they took the course that is prohibited by the Act. There is no alternative but to order them to reverse their position and comply with the law.⁹ Mere threats of economic hardships do not clothe an employer with immunity to violate the Act.¹⁰

The undersigned finds that on January 17, 1945, and at all times thereafter, the respondents, and each of them, refused to bargain collectively with the Union as the exclusive representative of their employees in an appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and by such refusal interfered with, restrained and coerced their respective employees in the exercise of the rights guaranteed in Section 7 of the Act.

C. The Discriminatory Discharges

About 11 o'clock on January 25, Lehaney told Close "to get the C.I.O. machinists out of the yard by 11:30, if not—the Bay Cities Metal Trades would pull the rest of the crafts out of the yard." Close, however, did not immediately discharge the machinists, but waited until late in the afternoon to inform them, as he testified, "that the A.F.L. had a contract in the yard and we were [going] to use A.F.L. machinists from that time on." At the end

⁹See *Matter of National Broadcasting Company, et al.*, 61 N.L.R.B., No. 21; *N.L.R.B. v. Star Publishing Co.*, 97 F (2d) 465 (C.C.A. 9).

¹⁰*Matter of John Engelhorn*, 42 N.L.R.B. 866, enf'd 134 F (2d) 553 (C.C.A. 3).

of the day shift all the machinists belonging to the Union were discharged.¹¹

The respondents and the Council have taken the position that Congress having validated closed-shop agreements in the proviso of Section 8 (3),¹² and such a sanctioned contract being the basis of the action here complained of, the respondents cannot be charged with an unfair labor practice when they discharged the 14 Union machinists then in their employ. These contentions are without merit. For, as found above, the contract in question is inoperative insofar as the machinists are concerned for the machinists belong to a separate and distinct

¹¹The complain alleges that 14 men were discharged on January 25. Of these 14, 11 were working in the yard that day. The remaining 3, Wall, Whatley and Lee, were hired on January 25, but were not to commence work until January 26. After Close had announced that no Union machinists would be employed, these 3 were informed of this announcement and they did not report on January 26.

¹²The proviso reads as follows: "Provided, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

unit. The contract did not cover the machinists. The record is clear that the respondents, when they discharged the Union's machinists, did not do so because they believed that they were enforcing the terms of the contract, but rather on account of the Council's threat to "pull the yard" if they refused to discharge the Union's machinists and replace them by the Council's machinists.

Upon the entire record, the undersigned finds that the respondents discharged the 14 named machinists on January 25, 1945, because of their membership and activities in the Union, thereby discouraging membership in the Union and encouraging membership in the Council and interfering with, restraining and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondents set forth in Section III, above, occurring in connection with the operations of the respondents described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the respondents have engaged in unfair labor practices, the undersigned will rec-

commend that the respondents, and each of them, cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The undersigned has found that the respondents have refused to bargain collectively with the Union. The undersigned will accordingly recommend that the respondents, upon request, bargain collectively with the Union as the exclusive representative of the respondents' employees in the appropriate unit in respect to rates of pay, wages, hours of employment and other conditions of employment.

Having found that the respondents discharged 14 named employees¹³ on January 25, 1945, and thereafter refused to reinstate them for the reason that they, and each of them, joined and assisted a labor organization and engaged in concerted activities for the purposes of collective bargaining and other mutual aid and protection, it will be recommended that the respondents offer them immediate and full reinstatement to their former or substantially equivalent positions.

It will be further recommended that the respondents make the said 14 named employees whole for any loss of pay they may have suffered by reason of the discrimination by payment to each of them of a sum equal to the amount he would normally have earned as wages from the date of the discharge

¹³See footnote 2.

to the date of the offer of reinstatement, less his net earnings¹⁴ during such period.

Upon the basis of the foregoing findings of fact and upon the entire record in the case the undersigned makes the following:

CONCLUSIONS OF LAW

1. East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, and Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of the 14 named employees,¹⁵ thereby discouraging membership in East Bay Union of Machinists, Local 1304, affiliated with the

¹⁴By "net earnings" is meant earnings less expenses, such as for transportation, room and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See Republic Steel Corporation v N.L.R.B., 311 U.S. 7.

¹⁵See footnote 2.

Congress of Industrial Organizations, and encouraging membership in Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, the respondents, and each of them, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

3. All of the respondents' machinists, machinist helpers, machinist specialists, machinist apprentices and machinist trainees, but excluding all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, was on January 2, 1945, and at all times thereafter has been, and now is the exclusive representative of the respondents' employees in the aforesaid appropriate unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

5. By refusing on January 17, 1945, and at all times thereafter, to bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of their employees in the appropriate unit, the respondents, and each of them, have engaged in and are engaging in unfair labor

practices, within the meaning of Section 8 (5) of the Act.

6. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act the respondents, and each of them, have engaged in and are engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that the respondents, and each of them, their agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, or any other labor organization of their employees by laying off, discharging, or refusing to reinstate any of their employees and from refusing to employ any member of the Union herein, or in any other manner discriminating in regard to the hire and tenure of employment or any term or condition of employment;

(b) Recognizing Bay Cities Metal Trades Council, affiliated with the American Federation of

Labor, as the exclusive representative of their employees in the aforesaid appropriate unit for the purposes of collective bargaining;

(c) Discharging any employee in the unit hereinbefore found appropriate in reliance on their contract of January 2, 1945, with the Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or any revisions thereof or any extension, renewal, revision, modification or supplement thereof or any superseding contracts which may now be in effect;

(d) Refusing to bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of their employees in the unit hereinbefore found appropriate, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(e) In any other manner interfering with, restraining, or coercing their employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which

the undersigned finds will effectuate the policies of the Act.

(a) The respondents, and each of them, shall offer to the 14 named employees¹⁶ immediately and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges;

(b) The respondents, and each of them, shall make whole each of the said 14 named employees for any loss of pay he may have suffered by reason of the respondents' discrimination in regard to his hire and tenure of employment, by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of the discrimination against him to the date of the respondents' offer of reinstatement, less his net earnings during such period;

(c) The respondents, and each of them, shall, upon request, bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all the respondents' machinists, machinist helpers, machinist specialists, machinist apprentices, and machinist trainees, but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to

¹⁶See footnote 2.

rates of pay, wages, hours of employment and other conditions of employment;

(d) The respondents shall post in their ship repair yard at Oakland, California, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the respondents' representative, be posted by them immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Twentieth Region, in writing within ten (10) days from the date of the receipt of this Intermediate Report what steps the respondents have taken to comply therewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondents notify said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondents to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective July

12, 1944, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

/s/ HOWARD MYERS,
Trial Examiner.

Dated: June 8, 1945.

APPENDIX A

NLRB 583 (9-1-44)

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board,

and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist East Bay Union of Machinists, Local 1304, C.I.O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All machinists of W. C. and Agnes Graham, doing business as Graham Ship Repair Co., including machinist helpers, machinist specialists,

machinist apprentices, and machinist trainees but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

The employees to be offered reinstatement with back-pay are: Frank E. Shaffer, James E. Potter, Elga O. Ashcraft, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis H. Whatley, and Lloyd M. Lee.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

W. C. and AGNES GRAHAM,
Doing Business as Graham
Ship Repair Co.
(Employer)

Dated:

By

(Representative) (Title)

Note: Any of the above-named employees presently serving in the armed forces of the United States will be offered full reinstatement upon application in accordance with the Selective Service Act after discharge from the armed forces.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

PETITION FOR REHEARING

Comes now Bay Cities Metal Trades Council, A. F. of L., party to contract, and petitions for rehearing in the above-entitled case and for grounds therefor alleges:

1. That the evidence does not support the decision and order in this case and that the said decision and order are, and each of them is, contrary to law.

We submit that the Board should grant a rehearing in this case in order to avoid a very gross miscarriage of justice. The trial examiner and the Board predicate their finding that the respondent's contract with the Bay Cities Metal Trades Council does not cover machinists upon the principal ground that the contract was intended to cover only production employees other than machinists.

We submit that an impartial examination of the evidence clearly negatives any such conclusion. Graham testified that he had authorized Ray Lehaney, his labor relations representative, to negotiate a contract. In this connection Graham testified as follows:

“Q. Did you instruct Mr. Lehaney as to his

authority to sign a collective bargaining agreement? A. I did.

Q. What instructions did you give him in that respect?

A. I authorized him to negotiate and sign a contract.

Trial Examiner: With whom?

A. With such unions as in his opinion was the appropriate ones." (Tr. p. 57)

At the time the contract was negotiated on January 2, 1945, there was no question as to what the Council intended as to its coverage. Mr. Thomas A. Rotell, Assistant Secretary of the Council, told Mr. Graham in very clear and concise language that all of his workers were required to be affiliated with the A. F. of L. (Tr. p. 52) Despite statements by respondent's counsel in the hearing which was improperly given credence by the trial examiner, the fact remains that respondent Graham admitted giving Mr. Lehaney authority to sign a collective bargaining agreement "with such unions as in his opinion, was the appropriate ones."

Ray Lehaney testified that Graham gave him full authority to sign a collective bargaining agreement (Tr. p. 294.) Although Graham claims that he did not know that Lehaney had signed an agreement until several days later, Lehaney testified that Graham did know that he signed an agreement on January 2, 1945, because Lehaney so informed him. The evidence, we believe, is conclusive on the fact that the agreement was intended to cover all of

respondent's production employees, including the machinists.

The Board finds that because there had been negotiations on the basis of a separate machinists unit, that unit must necessarily be an appropriate one. We submit that such a finding could only be justified on the theory that Graham was a successor to Walter Johnson and Judson Pacific War Industries. The evidence cannot justify any such finding. Not only is the evidence barren of any suggestion that Graham assumed any labor agreements that the respondent had with either the Bay Cities Metal Trades Council or the East Bay Union of Machinists, but the evidence shows that Graham did not know at the time he took possession of the yard whether or not the employees of his predecessor were in fact represented by a labor organization (Tr. p. 47).

The decision and order should be set aside and a rehearing granted upon the further ground that the Board's order requiring the employer to recognize Local 1304 as the collective bargaining representative of the employees is without support in the evidence and is contrary to law. This order is based upon a finding by the trial examiner that on January 17, 1945, respondent refused to bargain collectively with Local 1304. The evidence indicates quite clearly that respondent would have been in violation of the Act if he had recognized Local 1304 as the exclusive representative of his machinist employees and bargained with it on that

day. The record shows, and the trial examiner so finds, that on January 14, 1945, there were but three machinists in the employ of respondent and on January 21st only four. On January 25th when the C.I.O. machinist employees terminated their employment on instruction from their business agent, Smith, there were only eleven machinists actually employed. The evidence likewise shows that at the time of the hearing there were twenty-six machinists employed out of a total personnel of 289.

The evidence indicates that respondent commenced his ship repair operations on January 2, 1945, at which time he employed three machinists. The respondent contemplated employing a much larger number of employees, including machinists. His first ceiling was set at 250 and this ceiling was later increased so that at the time the case was argued before the Board, there were approximately 900 employees, including 108 machinists. It may not be denied that in view of these circumstances that the bargaining unit of machinists was a continuously expanding one.

The Board, in the Solar Aircraft case and other cases has consistently held that no exclusive recognition may be accorded to a union representing such an expanding unit and that an employer may not enter into a collective bargaining agreement with a union representing a majority of the employees in such an expanding unit until the unit represents 50% or more of a normal complement

or the number which an employer contemplates hiring.

It is very apparent from all the evidence in this case that the employer intended to, and did hire a great deal more than three machinists. In view of the Board's many decisions in which it has consistently adhered to its expanding unit theory, we are at a loss to understand how the Board may consistently issue an order commanding the employer to bargain with a union which represented three and certainly not more than eleven out of a unit which has grown from three to 108. The Council is entitled to receive the same consideration from the Board as other unions appearing before it. Unless the Board is prepared to state that it has abandoned the expanding unit theory, then we submit that it should apply it in this case and delete from its order all provisions in its order requiring the employer to bargain collectively with Local 1304. In its present form the order of the Board is violative of the principles repeatedly enunciated by the Board and is discriminatory and unjust.

On January 17, 1945, the date on which the Board found the company violated the Act in refusing to bargain with Local 1304, there were, as we have stated, but three machinists employed.

None of the machinists employed by respondent since January 25th are members of Local 1304. In fact, the evidence shows without contradiction that the machinists are members of the International Association of Machinists, A. F. of L.

We submit that the Board should attempt to administer the Act impartially and in so doing should set aside its decision and order at least to the extent of not requiring the employer to recognize Local 1304 as the exclusive collective bargaining representative of the machinists.

Under the circumstances of this case, the least that the Council and its affiliated unions may expect from the Board is that an election may be ordered among the machinists employed by respondent.

Respectfully submitted,
/s/ CHARLES J. JANIGIAN,
Attorney for Bay Cities Metal Trades Council,
A. F. of L.

September 21, 1945.

[Title of Board and Cause.]

ORDER DENYING PETITION FOR
REHEARING

On September 12, 1945, the Board issued its Decision and Order¹ in the above-entitled matter, finding, among other things, that the closed-shop contract of January 2, 1945, between the Council and the respondents was not a valid defense to the respondents' refusal to bargain with the Union on behalf of the machinists, because the contract did

¹63 N. L. R. B., No. 130.

not cover machinists and, even assuming arguendo that it did, a unit of production and maintenance employees, including machinists, is inappropriate in the circumstances of this case. On September 21, 1945, the Council filed with the Board a petition for rehearing on the following grounds:

1. The Council alleges that the record does not support the Board's finding that the closed-shop contract of January 2, 1945, was not intended to cover machinists. We find no merit in this contention. For the reasons set forth in the Intermediate Report attached to our Decision and Order, we reaffirm our finding in this respect.

2. The Council contends that the Board's finding that a unit of machinists is the only appropriate unit in the circumstances of this case, is predicated on the history of collective bargaining on a two-unit basis. It then attacks this finding on the ground that (a) such a finding can only be supported on the theory that the respondents are successors to Johnson Company and Judson-Pacific War Industries, which had bargained with the Union on the basis of a separate machinists' unit, and (b) the record does not support a finding of successorship because the respondents did not assume any labor agreements of their predecessors and were unaware of the fact that the employees of their predecessors were represented by a labor organization. We find no merit in these contentions. Moreover, the respondents' failure to assume any collective bargaining agreements of their

predecessors and their lack of knowledge concerning the representation of the employees of their predecessors are immaterial to our finding of the appropriate unit. Finally, as found in our Decision of September 12, 1945, the respondents took possession of the shipyard under the lease from the Johnson Company and continued their predecessors' established business of ship repairing without substantial changes in the personnel of the yard or in the nature of the business. A mere change in the identity of the employer does not rebut the presumption of the continued appropriateness of bargaining on a two-unit basis.

3. The Council finally contends that the respondents' refusal to bargain with the Union on behalf of the machinists was not violative of the Act because the machinists' unit was an "expanding unit" which at that time included only a small number of the total machinists contemplated to be employed by the respondents. This contention is raised by the Council for the first time and is inconsistent with its position in its brief before the Board. We are convinced that at the time of the respondents' refusal to bargain with the Union the machinists' unit was not an "expanding unit" as that term has been used by the Board in representation proceedings. But assuming arguendo the correctness of the Council's characterization of the machinists as an "expanding unit," the Board's procedure in representation proceedings is not inconsistent with its finding that the respondents' refusal to bargain with the Union violated the Act. It is the

Board's established practice to facilitate immediate collective bargaining. Accordingly, the Board has always directed an immediate election to determine the collective bargaining representative where the anticipated expansion in the personnel within the appropriate unit is neither measurable nor definite nor imminent, but is merely speculative.² In the instant case, the record shows that expansion in the respondents' business, the anticipated total number of machinists to be employed, and the date when full employment would be attained were neither measurable, imminent, nor certain in view of the insufficiency of the labor supply. We find no merit in the Council's contention.

It Is Hereby Ordered that the Council's Petition for Rehearing be, and it hereby is, denied.

Signed at Washington, D. C., this 23 day of October, 1945.

[Seal]

PAUL M. HERZOG,

Chairman.

JOHN M. HOUSTON,

Member, National Labor Relations Board.

²See, for example, Matter of Somerset Shipyards, Inc., 48 N. L. R. B. 430; Matter of Aluminum Company of America, Meade Aluminum Plant, 49 N. L. R. B. 1431.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11267

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. C. and AGNES GRAHAM, doing business as
GRAHAM SHIP REPAIR CO.,
Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U.S.C., § 151 et seq.), respectfully petitions this Court for the enforcement of its order against respondents, W. C. and Agnes Graham, doing business as Graham Ship Repair Co., Oakland, California, and their agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of W. C. and Agnes Graham, doing business as Graham Ship Repair Co. and East Bay Union of Machinists, Local 1304, C. I. O. and Bay Cities Metal Trades Council, A. F. of L., Party to the Contract, Case No. 20-C-1304."

In support of this petition, the Board respectfully shows:

(1) Respondents are engaged in business in the State of California within this judicial circuit. This Court, therefore, has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on September 12, 1945, duly stated its findings of fact, conclusions of law, and issued an order directed to the respondents, and their agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, W. C. and Agnes Graham, doing business as Graham Ship Repair Co., Oakland, California, and their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, or in any other labor organization of their employees, by laying off, discharging or refusing to reinstate any of their employees, by refusing to employ any member of the said labor organization, by conditioning further employment upon membership in

Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of their employment;

(b) Recognizing Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, as the exclusive representative of the employees in the appropriate unit described in paragraph 2 (c) of this Order;

(c) Giving effect to their contract, dated January 2, 1945, with the Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or to any extension, (renewal, revision, modification or supplement thereof, or to any superseding contract which may now be in effect, insofar as it affects their employees in the appropriate unit described in paragraph 2 (c) of this Order;

(d) Refusing to bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of their employees in the appropriate unit described in paragraph 2 (c) of this Order, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(e) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form labor organizations, to join or assist East Bay Union

of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Frank E. Shaffer, James E. Potter, Elga O. Ashcraft, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis H. Whatley, and Lloyd M. Lee immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges;

(b) Make whole the employees named in paragraph 2 (a) of this Order for any loss of pay they may have suffered by reason of the respondents' discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from the date of the respondents' offer of reinstatement, less his net earnings during such period;

(c) Upon request, bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all the respondents' ma-

chinists, machinist helpers, machinist specialists, machinist apprentices, and machinist trainees, but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(d) Post in their ship repair yard at Oakland, California, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the respondents' representative, be posted by them immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps the respondents have taken to comply herewith.

(3) On September 12, 1945, the Board's Decision and Order was served upon respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to respondents' counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certify-

ing and filing with this Court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondents, and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence and the proceedings set forth in the transcript, and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said Order of the Board and requiring respondents, and their agents, successors, and assigns to comply therewith.

NATIONAL LABOR

RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,

Assistant General Counsel.

Dated at Washington, D. C., this 28th day of February, 1946.

“APPENDIX A”

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist East Bay Union of Machinists, Local 1304, C.I.O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All machinists of W. C. and Agnes Graham, doing business as Graham Ship Repair Co., including machinist helpers, machinist specialists, machinist apprentices, and machinist trainees but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

The employees to be offered reinstatement with

pack pay are: Frank E. Shaffer, James E. Potter, Elga O. Ashcraft, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis H. Whatley, and Lloyd M. Lee.

We will not give effect to our contract, dated January 2, 1945, with the Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or to any extension, renewal, revision, modification or supplement thereof or to any superseding contract which may now be in effect, insofar as it affects our employees in the unit above described.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

W. C. and AGNES GRAHAM,
doing business as GRAHAM
SHIP REPAIR CO (Em-
ployer).

By.....
(Representative) (Title)

Dated.....

Note: Any of the above-named employees presently serving in the Armed Forces of the United States will be offered full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

District of Columbia—ss.

A. Norman Somers, being first duly sworn, states that he is Assistant General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

/s/ A. NORMAN SOMERS,

Assistant General Counsel.

Subscribed and sworn to before me this 28th day of February, 1946.

[Seal] /s/ JOHN E. LAWYER,

Notary Public, District of Columbia. My Commission expires August 14, 1949.

[Endorsed]: Filed March 6, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

On Petition for Enforcement of an Order of the
National Labor Relations Board

STATEMENT OF POINTS RELIED UPON
BY THE BOARD

Pursuant to Section 6 of Rule 19 of the Court, the Board submits the following statement of points

upon which it intends to rely in the above-entitled proceeding:

I.

The National Labor Relations Act is applicable to the operations of respondents W. C. and Agnes Graham, doing business as Graham Ship Repair Co.

II.

The Board's findings of fact are supported by substantial evidence. Upon the facts so found respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (1), (3) and (5) of the Act.

III.

The Board's order is valid.

Dated at Washington, D. C., this 28th day of February, 1946.

/s/ A. NORMAN SOMERS,

Assistant General Counsel,

National Labor Relations Board

[Endorsed]: Filed, March 6, 1946. Paul P. O'Brien, Clerk.

SUMMONS AND COMPLAINT

United States of America—ss.

The President of the United States of America:

To W. C. and Agnes Graham, doing business as Graham Ship Repair Co., 501 1st Street, Oakland, California; East Bay Union of Machinists, Local 1304, C.I.O., care of J. H. Sapiro, 1049 Mills Bldg., San Francisco, Calif., and Bay

Cities Metal Trades Council, A.F. of L., care of
Charles J. Janigian, 402 Flood Bldg., San
Francisco 2, Calif.:

Greeting:

Pursuant to the provisions of Subdivision (e) of
Section 160, U.S.C.A., Title 29 (National Labor Re-
lations Board Act, Section 10(e)), you and each of
you are hereby notified that on the 6th day of March,
1946, a petition of the National Labor Relations
Board for enforcement of its order entered on Sep-
tember 12, 1945, in a proceeding known upon the
records of the said Board as

“In the Matter of W. C. and Agnes Graham,
doing business as Graham Ship Repair Co., and
East Bay Union of Machinists, Local 1304,
C.I.O., and Bay Cities Metal Trades Council,
A.F. of L., Party to the Contract, Case No.
20-C-1304,”

and for entry of a decree by the United States Cir-
cuit Court of Appeals for the Ninth Circuit, was
filed in the said United States Circuit Court of
Appeals for the Ninth Circuit, copy of which said
petition is attached hereto.

You are also notified to appear and move upon,
answer or plead to said petition within ten days
from date of the service hereof, or in default of
such action the said Circuit Court of Appeals for
the Ninth Circuit will enter such decree as it deems
just and proper in the premises.

Witness, the Honorable Harlan Fiske Stone,
Chief Justice of the United States, this 6th day of
March in the year of our Lord one thousand, nine
hundred and forty-six.

[Seal] /s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

(Return of Service of Writs attached.)

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its
Chief of the Order Section, duly authorized by Sec-
tion 1 of Article VI, Rules and Regulations of the
National Labor Relations Board—Series 3, as
amended, hereby certifies that the documents an-
nexed hereto constitute a full and accurate tran-
script of a proceeding had before said Board en-
titled, "In the Matter of W. C. and Agnes Gra-
ham, doing business as Graham Ship Repair Co.
and East Bay Union of Machinists, Local 1304,
C. I. O., and Bay Cities Metal Trades Council,
A. F. of L., Party to the Contract," the same
being Case No. 20-C-1304 before said Board; such
transcript including the pleadings, testimony and
evidence upon which the order of the Board in said

proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order designating Howard Myers Trial Examiner for the National Labor Relations Board, dated March 15, 1945.

(2) Stenographic transcript of testimony held before Howard Myers, Trial Examiner for the National Labor Relations Board on March 15, 16, 17, 20, and 21, 1945, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner Myers' Intermediate Report, dated June 8, 1945 (annexed to Item 11 hereof).

(4) Copy of order transferring case to the Board, dated June 9, 1945.

(5) Copy of Council's telegram, dated June 13, 1945, requesting extension of time to file exceptions.

(6) Copy of telegram, dated June 15, 1945, granting extension of time to file briefs and exceptions.

(7) Copy of Council's letter, dated July 5, 1945, requesting oral argument before the Board. (7-A) Copy of telegram dated July 6, 1945, advising Board respondents will not file exceptions and brief.

(8) Copy of Council's exceptions to the Intermediate Report.

(9) Copy of notice of hearing for the purpose of oral argument before the Board, dated July 23, 1945.

(10) Copy of list of appearances at oral argument before the Board, dated August 14, 1945.

(11) Copy of Decision and Order issued by the National Labor Relations Board on September 12, 1945, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

(12) Copy of Council's petition for rehearing, dated September 21, 1945.

(13) Copy of order denying petition for rehearing, dated October 23, 1945.

In Testimony Whereof the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 28th day of February, 1946.

[Seal] /s/ JOHN E. LAWYER,

Chief, Order Section, National
Labor Relations Board.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-C-1304

In the Matter of:

W. C. and AGNES B. GRAHAM d/b/a
GRAHAM SHIP REPAID CO.

and

EAST BAY UNION OF MACHINISTS
LOCAL 1304, C.I.O.

and

BAY CITIES METAL TRADES COUNCIL,
A. F. of L., Party to the Contract.

Room 449, Post Office Building,
7th and Mission Streets
San Francisco, California

March 15, 1945

Pursuant to notice, the above-entitled matter
came on for hearing at 10:00 A.M.

Before: Howard Myers, Esq., Trial Examiner.

Appearances: John Paul Jennings and Wallace
E. Royster, 1095 Market Street, San Francisco,
California, appearing on behalf of the National
Labor Relations Board. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

PROCEEDINGS

Trial Examiner Myers: The hearing will be in order.

Mr. Jennings: If the Examiner please, Mr. Janigian, Counsel for Bay Cities Metal Trades Council, and for the International Association of Machinists, who are interested in these proceedings as a party to the contract which, under the allegations of the complaint, is stated to be invalid, has requested a continuance until tomorrow morning.

We have agreed with Mr. Janigian that he may have a continuance of 24 hours, if that is satisfactory with your Honor, and he has agreed that he will cooperate with us in an effort to expedite the hearing. I think it will expedite the hearing if the matter is put over until tomorrow morning.

Trial Examiner Myers: The other parties have agreed to the adjournment?

Mr. Jennings: All the parties are agreeable.

Trial Examiner Myers: Very well. We will stand adjourned now until 9:30 tomorrow morning.

(Whereupon, at 10:05 A.M., an adjournment was taken until Friday, March 16, 1945, at 9:30 A.M.) [2]

PROCEEDINGS

Trial Examiner Myers: Are you ready to proceed, gentlemen?

Mr. Royster: Ready.

Mr. Sapiro: Ready.

Mr. Stimmel: Ready.

Mr. Janigian: Ready.

Trial Examiner Myers: I would like to announce that this is a formal hearing before the National Labor Relations Board in the matter of W. C. Graham and Agnes B. Graham, doing business as Graham Ship Repair Co., and East Bay Union of Machinists, Local 1304, C.I.O. and Bay Cities Metal Trades Council, A. F. of L., party to the contract, being Case No. 20-C-1304.

The Trial Examiner appearing for the National Labor Relations Board is Howard Myers.

Will counsel please state their appearances for the record?

Mr. Royster: Wallace E. Royster, 1095 Market Street, San Francisco, for the Board.

Mr. Sapiro: J. H. Sapiro, 1049 Mills Building, San Francisco, appearing for Local 1304, and sitting beside me is Jim Smith, Business Agent of 1304.

Trial Examiner Myers: Just the attorneys representing the parties. [6]

Mr. Janigian: Charles J. Janigian, appearing for Bay Cities Metal Trades Council, A. F. of L., party to the contract.

Trial Examiner Myers: Anybody appearing for the Respondents?

Mr. Stimmel: Bernard B. Stimmel appearing for W. C. Graham and Agnes B. Graham and the Graham Ship Repair Co.

Trial Examiner Myers: Anybody else want their appearances noted?

Mr. Janigian: Mr. Thomas Rotell [7]—

Mr. Royster: Mr. Examiner, I have some formal papers to offer in evidence at this time. Copies of all these papers have been served upon the parties. As Board's Exhibit 1(a), I offer the first amended charge in this proceeding; as Exhibit 1(b), the Complaint; as Exhibit 1(c), Notice of Hearing; as Exhibit 1(b), an affidavit of service of the Complaint with a copy of the Charge and the Notice of Hearing by registered mail to International Association of Machinists, 307 Pacific [9] Building, Oakland, California, and East Bay Union of Machinists, Local 1304, C.I.O., Oakland, California; as Board's Exhibit 1(e), an affidavit of personal service of the first amended Charge, the Complaint and Notice of Hearing herein on the Respondents, W. C. and Agnes B. Graham, and Bay Cities Metal Trades Council, party to the contract; as Board's Exhibit 2, affidavit as to service of—first I will make the first two charges filed by individuals whose identities are not disclosed, and ask Board's Exhibit 2(a) be an affidavit as to service of the individual charges.

(Thereupon, the documents above referred to were marked Board's Exhibits 1(a), 1(b), 1(c), 1(d), 1(e), 2 and 2(a) for identification.) [10]

WALTER W. JOHNSON,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Myers: What is your name, sir?

The Witness: Walter W. Johnson.

Trial Examiner Myers: Will you please spell your last name for the record.

The Witness: J-o-h-n-s-o-n.

Trial Examiner Myers: And where do you live, Mr. Johnson?

The Witness: 82 Hillcrest Road, Berkeley.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Royster.

Direct Examination

Q. (By Mr. Royster) What is your business, Mr. Johnson?

A. During wartime I am engaged in the ship-building business, [15] in peacetime, mechanical engineering and gold mining engineering business.

Q. During the year 1944 did you operate a ship repair yard, or a shipyard? A. In 1944?

Q. Yes. A. Yes.

Q. Where was that—did you operate such a yard in Oakland, California—

Mr. Janigian: (Interposing) Excuse me, I wanted to object to the question on the ground that it is compound. It is either shipyard or ship repair, now which?

(Testimony of Walter W. Johnson.)

Mr. Royster: I will straighten that out, Mr. Janigian.

Trial Examiner Myers: Withdraw the question.

Mr. Royster: I will withdraw the question.

Q. (By Mr. Royster) During 1944, did you operate a shipyard in Oakland, California?

A. Yes.

Q. Where was that yard located?

A. Located at the foot of Washington Street, Oakland.

Q. Do you know if that yard is now being operated? A. I do.

Q. And by whom?

A. Graham Ship Repair.

Q. Is Graham Ship Repair Company one of the Respondents in [16] this case?

A. Yes, sir.

Q. During your operation of the yard, Mr. Johnson, did you employ machinists? A. Yes.

Q. Were they represented by any labor organization?

A. They were. I think I should say that I operated the yard, managed the yard, but the name of the company was Judson-Pacific War Industries. They owned the yard. I was a partner and general manager of the yard.

Q. I believe my last question to you, which you answered in the affirmative was: "Were the machinists represented by any labor organization"?

A. Yes.

(Testimony of Walter W. Johnson.)

Q. And what labor organization did represent the machinists?

Mr. Janigian: I will object to the question on the ground that it is calling for the conclusion and opinion of the witness.

Trial Examiner Myers: What?

Mr. Janigian: It is calling for the opinion and conclusion of the witness. I believe the document which would purport to authorize the organization to represent the workers would be the best evidence. It is not the best evidence.

Trial Examiner Myers: Overruled. Will the reporter [17] please read the question?

(The question referred to was read by the reporter.)

A. It was Local 1304, I believe is the number, C.I.O.

Q. Were other employees at your yard in Oakland represented by a labor organization?

A. Yes.

Q. And what is the name of that labor organization? A. That was the A. F. of L.

Q. Can you describe it more fully than the A. F. of L.?

A. Well, I don't know whether I could give all of the name. I couldn't describe it.

Q. Have you exhausted your recollection with respect—

A. (Interposing) Well, American Federation of Labor.

(Testimony of Walter W. Johnson.)

Trial Examiner Myers: And its various affiliates?

The Witness: Yes, the different crafts, with the exception of the machinists were represented by the American Federation of Labor.

Q. (By Mr. Royster) How many employees at your peak operation did you have, Mr. Johnson?

A. We had, during the summer of '44, approximately 650 at one time.

Q. Do you know about how many of those were machinists?

A. No, I would have to approximate it, 15 or 20, or 25 at the peak, say. [18]

Q. When did you cease operating the yard in Oakland to which reference has been made?

A. Well, I last—our last work was completed in December, about December 19th, if I recall, '44.

Q. Did you have machinists on the pay roll during the last days of your operation?

A. Yes, three.

Mr. Janigian: December 19th what?

The Witness: December, 1944.

Q. (By Mr. Royster) Did you give releases to any of those machinists during that month?

A. You mean clearance?

Q. Yes.

A. I don't know whether they were given clearances or not.

Trial Examiner Myers: Did you discharge them?

The Witness: Well, usually I don't handle that,

(Testimony of Walter W. Johnson.)

Mr. Examiner. The last day that they worked, according to the record that I have knowledge of, was on December 19th. Now, the practice has been sometimes men were laid off—if they laid off for a few days waiting other work, they weren't given a clearance, so I don't know whether they were discharged or given a clearance or not.

Q. (By Mr. Royster) During the fall of 1944, Mr. Johnson, did you diminish your labor force?

A. Yes.

Q. Do you know whether or not, when men were laid off during the fall of 1944, that any representation was made to them as to the possibility of resumed operations? [19]

A. Well, I'd think the picture was something like this: We had no mastership repair contracts, that yard was constructed in '43 for building barges and new work, and in 1944 we did some ship repair work, or conversion work, and in December it was a matter of, we had to determine what our policy was going to be, whether we would continue. We started to negotiate for ship repair contracts, and the work had—all the work we had was completed on December 19th, and between that time and January 1st an agreement was worked out to lease the property to the Graham Ship Repair Company. [20]

Mr. Royster: I don't insist on an answer to my question. Will the reporter mark these as Board's Exhibit 3 (a), (b), and (c) for identification.

(Testimony of Walter W. Johnson.)

(Whereupon the document above referred to was marked Board's Exhibit 3 (a), (b), and (c) for identification.)

A. I'm not trying to evade that question.

Trial Examiner Myers: Wait a minute, you don't have to answer that.

The Witness: It's difficult.

Trial Examiner Myers: Never mind.

Q. (By Mr. Royster): Mr. Johnson, I show you a document marked Board's Exhibit 3(a) for identification, and ask you if you can identify it.

A. Yes.

Q. And whose signature appears thereon?

A. James P. Smith.

Q. Does your signature appear anywhere on these papers?

A. Yes, mine is under schedule A.

Q. And does it appear on page—

A. (Interposing) Page 5.

Q. Board's Exhibit 3(b) for identification, can you identify that document? A. Yes. [21]

Q. And what is it?

A. What is the agreement?

Q. What is the document?

A. This agreement between the employees signatory hereto engaged in ship repair in the San Francisco area, agreement between East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, and the Judson-Pacific War Industries.

Q. Is that your signature? A. It is.

(Testimony of Walter W. Johnson.)

Q. As General Manager?

A. Walter W. Johnson, General Manager.

Mr. Sapiro: What is the date of that document?

The Witness: The document is dated April 1st, 1944, but was signed——

Mr. Royster: I don't believe any date of signature appears on there, but you can testify as to when you signed it, if you know.

Trial Examiner Myers: Let it go, will you, please, and you may have an opportunity later, Mr. Sapiro, to bring out the facts, if you want them.

Q. (By Mr. Royster) Board's Exhibit 3 for identification, can you identify that document, Mr. Johnson?

A. Yes.

Q. And what is that?

A. Well, it's a supplemental agreement, an amplification of Section 7 of the ship repair agreement between employers signatory and the East Bay Union of Machinists, Local 1304. [22]

Q. Does your signature appear on there as representative of any employer?

A. Yes, as General Manager of the Judson-Pacific War Industries.

Mr. Royster: All right.

Mr. Stimmel: What is the date on that?

Mr. Royster: I have no further questions, Mr. Examiner.

Trial Examiner Myers: Any questions?

(Testimony of Walter W. Johnson.)

Cross Examination

Q. (By Mr. Stimmel) What was the date on that last document, the date of signing?

Mr. Royster: What date did you sign these documents, Mr. Johnson?

The Witness: Well, in August—I'd like to see it, though.

Trial Examiner Myers: Are you going to offer those papers in evidence?

Mr. Royster: I am, but not right now.

The Witness: August 14th, 1942.

Mr. Royster: Did you sign all of them at that time, on that date?

The Witness: To the best of my recollection, I did.

Mr. Royster: No further questions, Mr. Examiner.

Trial Examiner Myers: Respondents' Counsel any questions to ask this witness?

Q. (By Mr. Stimmel) Mr. Johnson, at the time that you leased the yard to W. C. Graham, did you have any discussion with him or agreement that he was taking over any labor contracts [23] that you might have had with the unions?

A. No, I don't think there was any agreement that he was to take over the labor contracts.

Mr. Stimmel: That is all.

Trial Examiner Myers: Any questions, Mr. Janigian?

Mr. Janigian: Yes.

(Testimony of Walter W. Johnson.)

Cross Examination

Q. (By Mr. Janigian) Mr. Johnson, the sale of the yard to the Graham Ship Repair Company and to Mr. Graham and his wife was affected by you, was it not?

A. Yes. It was not a sale, it was a lease.

Q. It was a lease? A. Lease, yes.

Q. And was this a lease contract of certain machinery and equipment? A. Yes.

Q. In other words, personal property, the personal property that you owned at the site of this shipyard was sold to Mr. Graham and Mrs. Graham, or rather leased to Mr. Graham and Mrs. Graham? A. It was leased.

Q. Under lease contract?

A. That is right.

Q. Now, had you purchased these properties from the Judson-Pacific War Industries?

A. Yes.

Q. Now, at the time of sale, you were conducting the ship construction business or ship repair business under the name of [24] Walter Johnson Company? A. No.

Q. You were not?

A. No, I didn't start, after I purchased the equipment from the Judson-Pacific War Industries I didn't start the yard up or do any work there under the name of Walter W. Johnson Company.

Q. I see.

A. The yard remained inactive from about the

(Testimony of Walter W. Johnson.)

middle—after the work was completed on December 19th, it remained inactive, there was no work.

Q. But you purchased the yard from the Judson-Pacific War Industries about when, Mr. Johnson?

A. Well, it was in November, but we purchased the equipment in November from the Judson War Industries. At that time there was some uncompleted work where it was necessary to employ about seventy-five men, so they completed the work in the yard under their own name, and that was completed on or about December 19th.

Q. December 19th? A. Yes.

Q. You said that your other employees were represented by the A. F. L.? A. Yes.

Q. You couldn't recall the organization. I'll ask you whether or not the organization with which you had an agreement covering your other employees other than machinists, and those of the machinists category, was [25] with the Bay Cities Metal Trades Council?

A. Yes, Bay Cities Metal Trades Council, the contract was with them.

Q. Did this contract signed by the Judson-Pacific War Industries—

A. (Interposing) Was it?

Q. Yes. A. Yes.

Q. Did you personally sign the contract?

A. Yes.

Q. Under the name of the Walter Johnson Company?

(Testimony of Walter W. Johnson.)

A. No, that contract that you're referring to, that I'm referring to, was signed in April 19—I think in April, or in the spring of 1942.

Q. '42?

A. And it was signed between the Judson-Pacific War Industries and the Bay Cities Metal Trades Council. Now, you may have another contract in mind. I'm not certain whether the contract was drawn or not, but the Walter W. Johnson Company, a partnership, last fall did some work over at the Pacific Bridge, and that may be confusing to you.

Trial Examiner Myers: That is another yard?

The Witness: Another yard, yes.

Q. (By Mr. Janigian) That is another yard?

A. Yes.

Q. Was the real property upon which the yard is located sold to Mr. Graham and his wife?

A. You mean the land? [26]

Q. The land, yes.

A. That belongs to the Port of Oakland.

Q. I see.

A. It's held under a lease by the Walter W. Johnson Company.

Mr. Janigian: I think that is all.

Mr. Stimmel: Mr. Johnson, may I ask a question. Did you ever sign a contract with either union for the Walter W. Johnson Company for that particular yard at 501 First Street between December the 19th, 1944, and the date that the yard was leased to W. C. Graham?

(Testimony of Walter W. Johnson.)

The Witness: No, never did. [27].

Redirect Examination

Q. Now at the time, or during the negotiations for the lease of the property to the Grahams, did you have any discussions with either of them concerning labor relations?

A. With Mr. Graham?

Q. Yes. A. I did.

Q. And did you at that time inform him of your contracts, or the contracts of the Judson Company with these various labor organizations?

A. I did.

Mr. Janigian: Object to the question.

Trial Examiner Myers: I'll sustain the objection. Strike out the answer.

Mr. Sapiro: Well, might I suggest that if——

Trial Examiner Myers: (Interposing): Ask him what the conversation was.

Q. (By Mr. Sapiro): Very well. Will you tell us what you said? All I asked him is whether he had such a conversation, that was the question I was going to ask him. Tell us what you said concerning that and what Mr. Graham said?

Mr. Janigian: May I have the time and place, Mr. Sapiro?

Trial Examiner Myers: He asks that you fix the time.

Q. (By Mr. Sapiro): Where was the place of conversation and the time, and tell us who was present? [28]

(Testimony of Walter W. Johnson.)

A. The place would be at the Graham Ship Repair plant, the plant at the foot of Washington Street. The time would have been right after the 1st of January, 1945.

Q. After?

A. After the 1st of January, 1945.

Q. And could you tell us more definitely approximately how close to January the 1st, 1945, it was?

A. Well, I would—it's my belief that it would be during the first week of January.

Q. And tell us who was present at the conversation?

A. At one time there was, besides Mr. Graham, was this labor relations man, I can't think of the gentleman's name.

Q. Is this the gentleman here (indicating)?

A. Yes, Mr. Graham's labor relations man.

Q. Graham?

A. Raymond Lehaney, Lehaney, as near as I can recall. I think there were two conversations, but I didn't pay any particular attention as to the dates or anything, but I advised Mr. Graham, told him that we'd—of our contracts with the Bay Cities Metal Trades and the C.I.O., and I advised him that——

Mr. Janigian: (Interposing): I object to any advice.

Trial Examiner Myers: Tell us what you said.

The Witness: That is what I did. I told him that I——

(Testimony of Walter W. Johnson.)

Trial Examiner Myers: Advice is conclusion. Tell us what you said.

The Witness: I said that they had been very satisfactory, that we had had no difficulties, except small ones that had [29] always been ironed out satisfactorily to all parties concerned, and that I would continue the same relationship. And at the meeting we were standing out in the yard, and Mr. Lehaney was present at one time when I made that very definite statement. Our experience had been very satisfactory. I saw no reason for changing it.

Q. (By Mr. Sapiro): What did either Mr. Lehaney or Mr. Graham say, if anything, in response to that?

A. I couldn't repeat the conversation. I think Mr. Graham was——

Mr. Janigian: (Interposing): I'm going to object to it as incompetent, irrelevant and immaterial.

The Witness: I wouldn't attempt to repeat.

Trial Examiner Myers: Overruled.

Q. (By Mr. Sapiro): Can you give us the gist, not their exact words?

Trial Examiner Myers: Tell us what you remember that they said.

The Witness: No, I can't.

Trial Examiner Myers: Can't remember a word they said?

The Witness: Oh, yes. I can remember—I can tell you about their reactions.

Trial Examiner Myers: I don't want their reactions. Did they tell you to jump in the lake, or

(Testimony of Walter W. Johnson.)

did they say, "That is nice, I'm very glad to hear it," or what?

A. No, Mr. Graham was uncertain as to what to do, because he was not familiar with the labor situation around this bay. Mr. Lehaney—well, I can't tell the words, I wouldn't [30] attempt to.

Trial Examiner Myers: Any other questions?

Mr. Royster: No.

Q. (By Mr. Sapiro): You say that is one of the conversations. Now, was there a subsequent conversation? A. Yes.

Q. (By Mr. Sapiro): Yes. Will you fix the time and place as you did before and the persons present, if you can remember?

A. Well, the next time I took part in any meeting was perhaps about the middle of January between Mr. Lehaney, Mr. Graham, and Mr. Vogel, associated with Mr. Graham, and Mr. Smith of Local 1304. I just happened to drop into the yard that morning, I wasn't asked to take part in the meeting, but I did take part in it.

Q. And will you tell us what you can remember of the conversation and what was said by each one, as best you can remember?

Mr. Janigian: Same objection, Mr. Trial Examiner, incompetent, irrelevant and immaterial.

Trial Examiner Myers: Overruled.

A. Mr. Lehaney had signed an agreement with the A.F.L. covering the employment of machinists in the yard. That was [31] the first time I knew that had been done.

(Testimony of Walter W. Johnson.)

Q. Was that spoken of at that time?

A. That was the purpose of the meeting. Mr. Smith came down and objected to that arrangement.

Q. Proceed, Mr. Johnson.

A. There was a discussion there for perhaps fifteen minutes, and as I recall, the meeting ended with Mr. Smith was going to deliver some documents to Mr. Graham that had a bearing on that particular situation.

Q. Well, pardon me, can you remember anything that was said by any of the parties whose names you have mentioned, as being present at that meeting, the substance of it?

A. Yes, I can recall that Mr. Smith said that he would not let the C.I.O. machinists work under that kind of a situation.

Trial Examiner Myers: You didn't tell us anything at all about any situation. You didn't tell us anything that was said.

The Witness: All right.

Q. (By Trial Examiner Myers): You walked in, and these people were present when you walked into the yard? A. Yes.

Q. And where in the yard did you walk in on these people, somebody's office?

A. Yes, Mr. Graham's office. Then we went out into another smaller building where there was better opportunity for a meeting.

Q. All right, can you remember how the meeting started [32] when you got into this other small building?

(Testimony of Walter W. Johnson.)

A. Well, the discussion was largely between Mr. Smith and Mr. Lehaney.

Q. Do you remember anything that was said by either one of them?

A. I can recall that Mr. Smith said that he would not let the C.I.O. machinists work in the yard with that agreement in effect, the one that Mr. Lehaney or Mr. Graham had signed.

Q. Was there anything said about an agreement that had been signed?

A. To the best of my recollection there was.

Q. Well, can you tell us what was said about it, and by whom?

A. That was about all that was said that was pertinent to it.

Q. Do you know that there was an agreement signed before you got there?

A. Not until that morning.

Q. And who told you about it?

A. It came out in the meeting, during the discussion.

Q. What was said about the agreement?

A. That the agreement covered the use of machinists, A.F.L. machinists.

Q. And was that all that was said about it?

A. Well no, the meeting lasted for fifteen or twenty minutes, but I wasn't a party to the meeting, I just happened to be a spectator, and I wasn't paying a great deal of attention.

Q. What kind of an agreement was it?

(Testimony of Walter W. Johnson.)

A. That I don't know. I had never seen the agreement.

Q. I mean, what was said about the agreement covering everybody [33] in the yard?

A. Everybody in the yard.

Q. Including the machinists?

A. Including the machinists, yes.

Q. And who made that statement, do you remember?

A. No. It was very evident, however, that that was the arrangement. I don't recall who made the statement.

Trial Examiner Myers: Go ahead, Mr. Sapiro.

Mr. Sapiro: I think that is all.

Mr. Royster: I have no further questions.

Trial Examiner Myers: Any other questions?

Recross Examination

Q. (By Mr. Stimmel): Mr. Johnson, this meeting took place about the 15th of January, 1945, did it not?

A. Well about, I would say, it was shortly after Mr. Graham took possession of the yard to start work there.

Q. Was it definitely after the 5th of January?

A. No, I could not say.

Mr. Sapiro: Which conversation are you referring to, the last one?

Mr. Stimmel: Yes, where this contract was discussed with Smith, Lehaney, Johnson, Graham and those others present.

(Testimony of Walter W. Johnson.)

Trial Examiner Myers: Any other questions, gentlemen?

Mr. Janigian: Yes.

Recross Examination

Q. (By Mr. Janigian): Mr. Johnson, the leasing of the personal property to Mr. Graham was concluded in December of 1944, was it not, about December 30th or 31st? [34]

Mr. Sapiro: Well, I might suggest that if the contract is in writing, it can be shown and we'll fix the date.

Trial Examiner Myers: I'll overrule the objection.

The Witness: The date was of January 1st.

Q. (By Mr. Janigian): The delivery was as of January 1st? A. January 1st, 1945.

Q. Yes.

A. At the time Mr. Graham took possession of the yard, the agreement had not been developed into writing due to some work that he had secured, which came into the yard on January the 1st, or on the day before.

Q. Well, isn't it a fact that this lease arrangement was consummated on or about December 31st?

Trial Examiner Myers: What do you mean, consummated?

Mr. Janigian: Well, the agreement was made on December 31st.

A. No, we had had discussions about two weeks prior, the last two weeks of December, of '44.

(Testimony of Walter W. Johnson.)

Q. That is right.

A. About his leasing the plant.

Q. Yes.

A. When he took possession of the plant on January 1st.

Q. You mean January 1st?

A. January 1st, by reason of the fact that the Navy had some boats that just came in that were to be repaired, and he had been negotiating with the Navy for work, a master contract, and so he telephoned to me and asked if he could [35] put the boats in the plant, and I said yes, and I think we received the boats, our few men were there on the Sunday prior to January 1st, 1945, so he came in there and took possession of the property before the lease had been reduced to writing. However, it was a very definite verbal understanding which was being carried out.

Q. The possession of the premises, though, was delivered on January 1st, 1945?

A. '45, and Mr. Graham assumed the expense of operating the yard from that date.

Q. And Mr. Graham has had possession of the yard ever since January 1st, 1945?

A. He has.

Q. You have had no hand in the management of the Graham Ship Repair Company, or its operations, at any time, have you? A. No.

Mr. Sapiro: You mean since.

Q. I mean since January 1st, or at any time before or after. A. That is right.

(Testimony of Walter W. Johnson.)

Q. You had nothing to do with the Graham Ship Repair Company?

A. No, except to counsel with Mr. Graham and offer what assistance or advice I could.

Q. You weren't on the pay roll of the Graham Ship Repair Company? A. No.

Q. And, as a matter of fact, you were conducting a business of your own at the site of the Pacific Bridge Company, [36] isn't that right?

A. That is correct.

Q. Now at the site of the Graham Ship Repair yard, you said that Judson-Pacific, Inc., had conducted an operation, and the actual construction work was concluded about December 19th, I believe you said? A. Yes.

Q. Now, isn't it a fact that the Judson-Pacific War Industries constructed barges and did no repair work on that site?

A. No, that isn't a fact.

Q. What?

A. No, that isn't the fact. We constructed barges, and at the same time in '44 we did repair work.

Q. You did repair work?

A. Yes. In other words, we paid the repair rate, which you'd call that repair work, that was conversion of five barges about 225 feet long into refrigerator barges and air-cooled barges.

Q. But the principal work was the new construction work?

A. In length of time in dollars and cents, I think

(Testimony of Walter W. Johnson.)

that the conversion work was the greatest in dollars and cents.

Trial Examiner Myers: Is that what you call repair work?

The Witness: Repair work, yes.

Mr. Sapiro: Is that carried, the repair rate?

The Witness: Yes. [37]

Mr. Janigian: Just one.

Q. (By Mr. Janigian): Mr. Johnson, you know the difference between repair and conversion work, I presume, you have been in the business long enough?

A. I wouldn't attempt to differentiate between the two.

Mr. Janigian: Well, I'll withdraw the question.

Mr. Sapiro: You and I have argued about that for a long time, Mr. Janigian.

Trial Examiner Myers: Will you please don't break in on Mr. Janigian's examination, Mr. Sapiro?

Q. (By Mr. Janigian): Mr. Johnson, the work that was being done in 1944 by the Judson-Pacific War Industries was reconversion of new vessels which had been built elsewhere, is that not it?

A. No, not as I understand what a new vessel is. Any vessel that has been to sea is not a new vessel, and these vessels we did this conversion work on had all been to sea.

Q. And you paid the repair rate for all such work? A. Yes, we paid the repair rate.

Q. To all mechanics? A. Yes.

(Testimony of Walter W. Johnson.)

Q. To all people working on them?

A. On the conversion.

Q. On the conversion? [38] A. Yes.

Mr. Janigian: I think that is all.

Q. (By Trial Examiner Myers): Now, will you tell me which came first with respect to the lease, the Judson Company or the Walter C. Johnson Company?

A. The Judson-Pacific War Industries came first.

Q. And when was that lease started, approximately? A. In the spring of 1943.

Q. '43? A. Yes.

Q. And how long was that firm in existence at that yard?

A. During the year 1943 until December, 1944.

Q. When did the Johnson Company come in?

A. At that yard, we never did any work in that yard?

Q. You didn't?

A. No, never even took possession of it, because the Judson-Pacific War Industries finished their work in December, that was the agreement, and they carried their employees, remained there until January 1st, 1945.

Q. And the lease which Mr. Graham signed was between the Judson Company and Mr. Graham, and his wife, is that right?

A. No, it was between the Walter W. Johnson Company, because we took over—the Walter W.

(Testimony of Walter W. Johnson.)

Johnson Company took over the property by contract of purchase in November '44.

Q. November what? A. '44.

Q. Then there is just a lease from the Judson to the Johnson Company? [39]

A. No, that is a sale.

Q. It was a sale? A. A sale.

Q. All right. Now, a sale of what, of all the personal property?

A. All the personal property, yes.

Q. Including the lease which the Judson Company held from the Port of Oakland?

A. Port of Oakland which was then cancelled, and a new lease was made between the Port of Oakland and the Walter W. Johnson Company.

Q. And that was sometime in November of '44?

A. No, that was January 1st, 1945. That might be a little difficult, those dates, but it would have been more difficult for——

Q. (Interposing): Was it a simultaneous transaction between the Judson Company to the Johnson Company, and from the Johnson Company to Gramms? A. No.

Q. Well, tell us about them.

A. I say, in November the Judson-Pacific War Industries was ceasing operation, there as a company, it was liquidating its assets, the Walter W. Johnson Company purchased the personal property at what we call plant 2, that is the Graham Ship Repair, but there was some work remaining to be done by the Judson-Pacific War Industries in plant

(Testimony of Walter W. Johnson.)

2, which was terminated, I mean completed in December, 1944, so it was agreed between the Judson-Pacific War Industries and myself that they would remain in possession of the plant and complete [40] the work, and then we would take possession of the plant after January 1st.

Q. And when that was completed did Johnson Company take possession?

A. Not until January 1st.

Q. All right, January 1st. A. Yes.

Q. And when did Johnson sell it to Graham?

A. The same date.

Q. I mean, lease it to Graham.

A. The same date.

Q. The same date?

A. Yes. Well, we contemplated it would be leased the same date, but this work came in before the lease was consummated.

Q. You mean, before the lease was reduced to writing? A. That is right.

Q. But it was the understanding that the lease was to date from and as of January 1st, 1945, is that right? A. That is right.

Trial Examiner Myers: Any other questions, gentlemen?

Redirect Examination

Q. (By Mr. Sapiro): Now, between December the 19th, 1944, and January the 1st, 1945, were there employees in the plant?

A. No, only the superintendent and the assist-

(Testimony of Walter W. Johnson.)

ant, a few in the office, and one or two men for maintenance.

Q. Some maintenance men?

A. Maintenance men.

Q. And were those maintenance men members of 1304? [41]

A. Not to my knowledge. I have no way of knowing, except I don't believe they were. I think the last machinist in our employ was on December 19th, as far as I know.

Mr. Sapiro: That is all.

WARREN C. GRAHAM,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Myers: What is your name, please, sir?

The Witness: Warren C. Graham.

Trial Examiner Myers: And where do you live, Mr. Graham?

The Witness: At the Hotel Coit in Oakland.

Trial Examiner Myers: You may proceed, Mr. Royster.

Direct Examination

Q. (By Mr. Royster): What is your business, Mr. Graham?

A. Engaged in the ship repair and conversion business at 501 First Street, Oakland.

(Testimony of Warren C. Graham.)

Q. Under what name do you operate your business?

A. Under the Graham Ship Repair Company.

Q. And is that a partnership?

A. It's a special partnership composed of my wife as a limited partner, and myself as general partner. [42]

Q. Is your wife Agnes B. Graham?

A. Yes.

Q. Does she take any—does Agnes B. Graham take any active part in the management of the yard?

A. None whatever.

Q. Where is the yard located?

A. 501 First Street, Oakland, which is at the foot of Washington Street.

Q. What is the nature of the work done there?

A. Ship repairs, conversions for vessels of the Navy, and the War Shipping Administration.

Q. What was the approximate value of the repair work performed at the yard during January and February, 1945?

A. Slightly less than \$200,000.00

Q. What do you estimate the annual value of the repair work to be?

A. About two and a half million dollars.

Q. And what was the approximate value of materials and supplies purchased by you during January and February, 1945?

A. About \$60,000.00.

Q. Of that amount, Mr. Graham, approximately what per cent had its origin outside of California?

(Testimony of Warren C. Graham.)

Mr. Janigian: If he knows.

A. My pure guess would be——

Trial Examiner Myers: I don't want any guess, approximately.

The Witness: Approximately fifteen to twenty per cent of that, I would say. [43]

Q. (By Mr. Royster): What do you estimate your annual purchase of supplies and materials to be, on an annual basis?

A. Oh, between six and eight hundred thousand dollars.

Q. Well of that amount, six or eight hundred thousand dollars, what percentage of that do you estimate will be received from points outside California?

A. Approximately the same percentages.

Q. Fifteen to twenty per cent?

A. Yes, that is the average for the average ship repair yard.

Q. To what use are the vessels put that you repair?

A. The vessels are combat vessels of the Navy and merchant ships of the Merchant Marine.

Q. Are the merchant ships of the Merchant Marine used in interstate and foreign commerce?

A. That I couldn't swear to.

Q. Do you concede that the operations of you and your partner at the yard you have described are in interstate commerce?

Mr. Janigian: Asking for the opinion and conclusion of the witness, objected to upon that ground.

(Testimony of Warren C. Graham.)

Trial Examiner Myers: Overruled. Any question, Mr. Stimmel, of jurisdiction?

Mr. Stimmel: Same objection.

Trial Examiner Myers: I'm asking you, have you any question that the Board has jurisdiction over your clients?

Mr. Stimmel: Well, I will state that I doubt that the Court has jurisdiction, because Mr. Graham wouldn't know whether the vessels were used, that the goods he used were [44] used in interstate commerce or not.

Trial Examiner Myers: Well, that question has been answered already. Now, what about, you say you contest the jurisdiction of the Board?

Mr. Stimmel: Yes, on the grounds that the man is not engaged in interstate commerce.

Trial Examiner Myers: All right, will you read—I'll overrule the objection. Read the question to the witness.

(The question referred to was read by the reporter.)

Trial Examiner Myers: Well, it's a question of law. I'll sustain the objection. Go ahead and ask some other question, or reframe your question.

Q. (By Mr. Royster): When did your operations begin at the yard in Oakland, Mr. Graham?

A. January the 1st.

Q. Had the yard been operated previously?

A. We took it over from the Judson-Pacific War Industries through Walter W. Johnson, we were

(Testimony of Warren C. Graham.)

not at the yard until January the 1st. Whether they were active before that, I do not know.

Q. Did any of the employees of Judson-Pacific War Industries or of Walter Johnson continue in your employment?

A. Yes, the first day we had eight employees in the office, which were previously employees of the Judson-Pacific War Industries.

Q. Other than office employees, did you take over any employees of the Judson-Pacific War Industries? [45]

Mr. Janigian: Object to the question on the ground that it's asking for the opinion and conclusion of the witness. Object specifically to the word "take over."

Trial Examiner Myers: Reframe your question.

Q. (By Mr. Royster): When did you begin hiring machinists at your yard?

A. January the 3rd.

Q. And where did you procure those machinists?

A. To my direct knowledge and belief, to my direct knowledge I don't know, I ascertained from our superintendent that these men, we hired three men on the 3rd of January. It's my information from the plant that those men appeared at the gate on that day, and they were hired by the superintendent.

Q. Do you have any agreement with the Navy with respect to hiring employees? A. Yes.

Q. What is that agreement?

A. In order not to disturb the manpower ceiling,

(Testimony of Warren C. Graham.)

or affect, seriously affect the working in the other shipyards, ship repair yards, we agreed that we would only hire previous employees of the Judson-Pacific War Industries, or men who were taken out of the bay area, that was later revised to include men from new construction yards, or those laid off previously, ten days from a ship repair yard.

Q. Have you followed that agreement?

A. Yes, sir.

Q. Have you then hired workers who previously had been employed by Judson-Pacific? [46]

A. Yes, sir.

Q. With respect to the three machinists who went on your pay roll on January 3rd, is it not true that they came from Judson-Pacific?

A. They were previously employees of the Judson-Pacific War Industries. The reason why I know, because we prepared a list of all the Judson-Pacific War Industries employees in conjunction with the Judson-Pacific War Industries and presented that to the Navy.

Q. Did you use that list also for the purpose of recruiting workers?

A. We sent that list to the War Man Power Commission so they would only send us workers from that list.

Q. When you began your operations on January 1st, did you know whether Judson-Pacific War Industries employees had been represented by a labor organization? A. No, sir.

Q. (By Mr. Royster): Have you at any time

(Testimony of Warren C. Graham.)

made any inquiry respecting labor relations affecting machinists in ship repair yards, in Alameda County? [47]

Mr. Janigian: Objected to on the ground it's incompetent, irrelevant and immaterial.

Trial Examiner Myers: It calls for a yes or no answer. Overruled.

The Witness: Yes.

Q. (By Mr. Royster): When did you make such inquiry?

Mr. Janigian: Same objection.

Trial Examiner Myers: Overruled.

The Witness: Between the 3rd of January and the 10th.

Trial Examiner Myers: This year?

The Witness: Of this year, yes.

Q. (By Mr. Royster): Of whom did you make inquiry?

A. Of Mr. Raymond Lehaney, who was employed by us as a labor relations director.

Q. When did you employ Mr. Lehaney?

A. In December, 1944, the latter part.

Q. What was Mr. Lehaney's background?

A. Mr. Lehaney had spent practically all of his life in the labor movement, had been a reporter on a labor paper, and his last employment was public relations director of the west coast for the Teamsters Union.

Trial Examiner Myers: What union?

The Witness: Teamsters Union.

(Testimony of Warren C. Graham.)

Trial Examiner Myers: You mean that was his job just prior to going with you?

The Witness: He retained that job in agreement with the union, he retained that job in addition to working for me.

Trial Examiner Myers: You mean while he was in your employ? [48]

The Witness: As labor relations director.

Trial Examiner Myers: He also had this job with the Teamsters Union?

The Witness: That is correct, that is any agreement with the Teamsters Union, that he would retain that job as well as working for me.

Q. (By Mr. Royster): You say your agreement with the Teamsters Union; did you agree with them with respect to Mr. Lehaney's employment?

Mr. Janigian: I'm going to object to any questions with respect to Mr. Lehaney's employment, on the ground that it's incompetent, irrelevant and immaterial. I don't think Mr. Lehaney is on trial, nor the Teamsters Union is on trial. What difference does it make?

Trial Examiner Myers: Overruled.

Mr. Royster: Mr. Lehaney is an employee of Mr. Graham.

Trial Examiner Myers: I have made my ruling.

(Last question was read by the reporter.)

The Witness: Yes.

Trial Examiner Myers: Is that the A.F.L. Teamsters Union?

(Testimony of Warren C. Graham.)

The Witness: Yes, Mr. Twohy the Vice President of the Union.

Q. (By Mr. Royster): Well, just for the sake of the record, is that the International Brotherhood of Teamsters, Warehousemen, Chauffeurs and Helpers of America, A.F.L.?

Mr. Janigian: Well, just a minute, may it be understood that I have an objection to all questions affecting [49] Mr. Lehaney's background, his previous employment, present employment, or any of those circumstances.

Trial Examiner Myers: How can you have an objection to something that wasn't brought out yet? If you'll reframe your objection.

Mr. Janigian: All right. I'll object to the last question specifically as incompetent, irrelevant and immaterial, and time consuming.

Trial Examiner Myers: Overruled.

The Witness: Yes.

Q. (By Mr. Royster): Did you give Mr. Lehaney any instructions with respect to dealing with labor organizations affecting employees at the yard?

A. Yes.

Q. What instructions did you give him?

Trial Examiner Myers: When did you give him these instructions?

The Witness: The latter part of December.

Trial Examiner Myers: '44?

The Witness: '44, about the 20th, I imagine.

Trial Examiner Myers: You mean after you hired him?

(Testimony of Warren C. Graham.)

The Witness: After we had agreed to employ him, I told him that we wanted to establish fair relations with labor on the west coast, and his job would be to show that we would try to enjoy pleasant relations with labor, and his job would be to promote such relations.

Q. (By Mr. Royster): Did you——

A. I told him that his job would be to report to me anything [50] which the management could do, which would affect those relations.

Q. In early January, 1945, did you and Mr. Lehaney visit the offices of Bay Cities Metal Trades Council? A. We did.

Q. Can you state, can you give me the date more closely than early January?

A. January the 2nd.

Q. Did you have a conversation there?

A. Yes, sir.

Q. With whom?

A. We met with Mr. Wynn, who is Secretary of the Council, Mr. Rotell, and two or three of the others.

Q. What is Mr. Rotell's position; did you know at that time what his position was?

A. Well my—I was informed that he had——

Trial Examiner Myers: Do you know what it was then?

The Witness: Definitely not, except that I——

Trial Examiner Myers (Interposing): All right, what was his job then?

Mr. Janigian: Assistant Secretary, Mr. Myers.

(Testimony of Warren C. Graham.)

Trial Examiner Myers: And does he have that job now?

Mr. Janigian: Yes.

Trial Examiner Myers: And what is his first name, please?

Mr. Janigian: It's Thomas Rotell.

Trial Examiner Myers: And what is Mr. Wynn's first name?

Mr. Janigian: A. T. Wynn. [51]

Q. (By Mr. Royster): What was the conversation that you and Mr. Lehaney had with Mr. Rotell, Mr. Graham?

A. I had stated that I had previously operated under—in the East in a closed shop A.F.L. agreement, and that we had enjoyed pleasant relations with labor and we wanted to do so while we were operating in the bay area.

Q. What did Mr. Rotell have to say to that?

A. Well, we were—he was very pleased, and stated that he would assure us that such relations would continue or be effected here, and stated that it was his desire that we sign an agreement for the workers, of any workers we would employ in this particular area.

Q. What did he say to you specifically regarding machinists?

A. I don't recall any specific statement regarding machinists, except to say that he wanted all the workers to be affiliated with the A.F.L. Now, whether machinists were mentioned specifically or not, I do not recall.

(Testimony of Warren C. Graham.)

Q. Is it not true, Mr. Graham, that Mr. Rotell told you on that occasion that no new ship repair yard operation would come into the bay area unless the machinists were covered by an A.F.L. contract?

Mr. Janigian: Object to the question on the ground that it's leading and suggestive, and an attempt on the part of Counsel to cross examine his own witness.

Trial Examiner Myers: Overruled.

A. I do not recall specifically said machinists, but he said all workers.

Q. You deny then that that remark was made specifically as to machinists? [52]

A. I do not recall it as being made specifically to machinists, but I do recall it as being all workers. There was exhibited to me a contract with a company called the Ship Repairers, which it was stated that such an agreement was effected with them, and it was expected that an agreement, similar agreement would be effected with us.

Q. Well, did you sign a contract with the Bay City Metal Trades on January 2nd?

A. No, sir. We talked and said that we'd look into the matter, and I told them at the time that Mr. Lehaney was our labor relations director and would have authority on my authority to negotiate and sign any contract with them.

Q. Now, you say that you told Mr. Rotell that you wanted to look into the matter. What did you mean by that, Mr. Graham?

(Testimony of Warren C. Graham.)

A. We wanted to investigate their particular contract.

Q. Was a contract offered to you on that day?

A. I don't recall one being so offered, except to say that they would expect us to sign a contract similar to this one that was exhibited.

Q. Did you take a form of contract away with you for study or examination? A. No, sir.

Q. What inquiry did you feel it necessary to make so that you told Mr. Rotell you would make inquiry?

A. Well, I had told Lehaney that we would investigate the complete situation here, and he would give me a report on it.

Q. Do I understand from that, that you directed Mr. Lehaney to make an investigation? [53]

A. That is correct.

Q. Did he make such an investigation, do you know? A. Yes.

Q. Did he report to you on it?

A. Yes, it developed as the days went by that there existed, in our particular area where we operated a predominance of C.I.O. machinists.

A. We discussed the thing practically daily, almost every day.

Trial Examiner Myers: For how long?

The Witness: Oh, up until, I guess, about the 10th, approximately the 10th.

Trial Examiner Myers: When did the reports start to come in?

(Testimony of Warren C. Graham.)

The Witness: Immediately when he arrived, we went out that day.

Trial Examiner Myers: You mean on the 2nd of January?

The Witness: The 2nd of January.

Trial Examiner Myers: And from the 2nd until the 10th he made reports to you almost daily?

The Witness: That is correct.

Trial Examiner Myers: Were the reports in writing? [54]

The Witness: No.

Trial Examiner Myers: Just oral?

The Witness: Oral.

Q. (By Mr. Royster): What report did he make to you, if any, with respect to machinists?

A. He reported that there existed in this area of our yard a number of C.I.O. machinists, that the various ship repair yards in our category employed C.I.O. machinists, and recommended that—

Trial Examiner Myers (Interposing): Don't tell us recommended, tell us what he said.

The Witness: Said that he had talked to the various labor people, and he thought the best policy for the company would be to sign a contract with the Bay City Metal Trades Council for the remaining craft, and with the C.I.O. for the machinists.

Mr. Janigian: I'm going to ask that the answer be stricken, because it's incompetent, irrelevant and immaterial. We're faced in this case, Mr. Trial Examiner,—I'll be very brief,—with a complaint which alleges a certain violation of the National

(Testimony of Warren C. Graham.)

Labor Relations Act. The conversation which Counsel is attempting to extract from this witness has to do with the existence of C.I.O. contracts and the existence of C.I.O. machinists in the area where Mr. Graham and his wife operate the yard. I know nothing in the act which provides that any particular union has territorial jurisdiction, so to speak, or that the fact that other plants have contracts with a union in itself [55] compels an employer to sign a similar contract. I think we ought to limit this inquiry to the issues, were the machinists represented, and do they constitute an appropriate unit, and does the unit covered by the A.F.L. contract constitute an inappropriate unit, and is therefore void.

Trial Examiner Myers: Overruled.

Q. (By Mr. Royster): Did Mr. Lehaney report to you with respect to the union affiliation of machinists working at the yard?

A. Yes. He said that our machinists in the yard then belonged to the C.I.O. union.

Q. Just to clarify your testimony, I believe,—I may be in error—

Trial Examiner Myers (Interposing): Well, let's not start all those preliminaries now, let's get one question after another and go at it snappy. What is it, Mr. Janigian?

Mr. Janigian: I was going to ask that the answer be stricken on the ground that it's hearsay, second class removed.

Trial Examiner Myers: Overruled.

(Testimony of Warren C. Graham.)

Q. (By Mr. Royster): Did you enter into a collective bargaining contract with any labor organization?

A. Mr. Lehaney told me he did. I did not see it.

Trial Examiner Myers: Did you sign it?

The Witness: I did not, no.

Trial Examiner Myers: Was it signed on behalf of the ship yard?

The Witness: Mr. Lehaney so signed it. [56]

Trial Examiner Myers: Have you got a copy of it?

The Witness: No, sir, I have not.

Trial Examiner Myers: Did you ever see one?

The Witness: Two days ago, yes, sir.

Trial Examiner Myers: Where did you see it?

The Witness: In my lawyer's office.

Trial Examiner Myers: Has he got it?

The Witness: No, Mr.—

Mr. Janigian: I have it.

Trial Examiner Myers: You, Mr. Janigian?

Mr. Janigian: That is right.

Trial Examiner Myers: All right, go ahead.

Q. (By Mr. Royster): Did you instruct Mr. Lehaney as to his authority to sign a collective bargaining agreement?

A. I did.

Q. And what instruction did you give him in that respect?

A. I authorized him to negotiate and sign a contract.

Trial Examiner Myers: With whom?

(Testimony of Warren C. Graham.)

The Witness: With such unions as in his opinion was the appropriate ones.

Q. (By Mr. Royster): Do you know James P. Smith, business agent of East Bay Local Union of Machinists, Local 1304?

A. Yes, sir.

Q. Have you ever had a conversation with him? A. Yes, sir.

Q. When was the first conversation?

A. On or about the 5th of January.

Trial Examiner Myers: What year?

The Witness: 1945, about 10 P. M. He called me [57] at the Hotel Maurice, where I was living, and said he wanted to meet with me, told me who he represented, that he represented the 1304 C. I. O. machinists. I told him that I had employed a labor relations director from labor, and I felt sure that Mr. Lehaney would be glad to meet with him, and told him I would—told him where he could get ahold of Mr. Lehaney, and I so instructed Mr. Lehaney to get ahold of him.

Q. (By Mr. Royster): Did you ever sign a collective bargaining contract with Local 1304?

A. No, sir.

Q. Did you ever offer to sign such a contract?

A. I, myself, and Lehaney told Mr. Close, our plant superintendent——

Q. (Interposing): Just a moment, Mr. Graham, who told Close?

A. Lehaney and myself both together told Close to sign such an agreement.

(Testimony of Warren C. Graham.)

Q. When was this?

A. Shortly after the 5th of December.

Trial Examiner Myers: December?

The Witness: January.

Trial Examiner Myers: You mean shortly after the 5th of January, 1945?

The Witness: That is right.

Q. (By Mr. Royster): Do you know whether or not Mr. Close ever signed such an agreement?

A. No, sir. Mr. Close reported to me that he endeavored to get in touch with Mr. Smith and he could not. [58]

Q. It's true, is it not, Mr. Graham, that on January 25, 1945, all Local 1304 machinists were discharged from the yard?

A. January, what date?

Q. 25, 1945.

A. Around that date there was—they weren't discharged, there was a change between—to A. F. L. machinists.

Q. What was that change, Mr. Graham?

A. A. F. L. machinists were replaced, the C. I. O. machinists.

Q. Well, were the C. I. O. machinists offered opportunity to continue their employment?

A. I was told so, I didn't—to my own knowledge and belief I do not know.

Q. Who, if any one, had a conversation with the C. I. O. machinists with respect to their employment on that date; who, if any one with your company, representing you?

(Testimony of Warren C. Graham.)

A. I had authorized Lehaney to handle such a matter, and I understand also that Mr. Close, our plant superintendent, was associated with the handling of the matter.

Q. Well, is it true that after January 25, 1945, Local 1304 machinists were not permitted to work in your yard?

A. I wouldn't say not permitted, they didn't work.

Q. You testified that the A. F. L. machinists took over, or replaced C. I. O. machinists?

A. That is right, replaced.

Q. Subsequent to January 25, 1945, did you require, as a condition of employment, that a machinist belong to a union [59] affiliated with Bay City Metal Trades Council? A. Yes, sir.

Q. Have you been requested to reinstate Local 1304 machinists to the employment they had at your yard on January 25, 1945?

Trial Examiner Myers: Do you understand the question?

The Witness: Yes, I do. I'm trying the figure out the answer to it. I wouldn't say official request, but Mr. Smith and I have discussed the possibility of such employment.

Q. (By Mr. Royster): Have you ever offered to reinstate these men to their employment?

A. I told Mr. Smith that we would if we could work out some kind of an agreement with the A. F. L.

Mr. Royster: That is all. [60]

(Testimony of Warren C. Graham.)

Cross Examination

By Mr. Stimmel:

Q. Mr. Graham, on January the 25th, did you post any notice in your plant to the effect that men to continue their employment as machinists had to be affiliated with the A. F. L.? A. No.

Q. Was any notice posted on that date or subsequent thereto saying that any man who was a member of the C. I. O. could not continue as a machinist? A. No.

Trial Examiner Myers: Did you post the contract?

The Witness: I don't understand. [61]

Trial Examiner Myers: You made a contract with the Metal Trades, didn't you? Did you post that contract?

The Witness: No.

Q. (By Mr. Stimmel): Mr. Graham, in connection with the amount of materials that you use or buy for use in your yard, my recollection is that you testified that about fifteen per cent of your material was purchased outside of the state, is that correct?

A. That is correct.

Q. How much of that material that comes from outside of the state is actually bought by you from outside the state, that is ordered placed for the outside of the state?

Mr. Sapiro: Object to that as immaterial.

Trial Examiner Myers: Overruled. You may answer.

(Testimony of Warren C. Graham.)

A. My approximation would be half of that, about seven per cent, something like that.

Q. Then, I understand the answer to be that about seven or seven and a half per cent of the material that is purchased is actually ordered from outside of the state?

A. That is right, New York, Detroit, or similar places.

Mr. Stimmel: That is all.

Trial Examiner Myers: Any questions, Mr. Janigian?

Mr. Janigian: Yes.

Cross Examination

By Mr. Janigian:

Q. With respect to this percentage that you have mentioned, Mr. Graham, as to materials purchased outside the state, have you made any check of your books prior to testifying here this morning, to ascertain just [62] what the percentages were of purchases outside the State of California?

A. Not for this particular purpose, but for my own information, for instance, ordering a desk from Shaw Walker Company in Milwaukee, or vapor car boilers from New York City.

Q. I mean, your best estimate is what you have given?

A. To my best knowledge and belief, whether that is the exact amount, but I would say it would be approximately so.

Q. The both, the 15th and the seven per cent, or thereabouts? A. That is right.

(Testimony of Warren C. Graham.)

Q. (By Mr. Janigian): Now, you gave certain estimates as to your yearly purchases. Now, that is based upon any definite estimate, Mr. Graham, of work that you expect to do?

A. The usual percentages of such a purchase in a ship repair yard.

Q. I know, but with respect to this volume of, I believe you testified, six to eight hundred thousand dollars worth of supplies that you said you would use in the course of a year, where did you obtain those figures?

A. Based on a business of approximately \$200,000.00 per month, there would be around fifty to sixty thousand dollars of merchandise purchased for that.

Q. Isn't this a fact, Mr. Graham, that it's uncertain now [63] whether you will even have any business to do next month or the month after?

A. That is true.

Q. I mean, ship repair work is very indefinite and uncertain, is that right?

A. That is true.

Q. And since you have operated that yard, you have had a peak employment of how many persons?

A. Four hundred seven.

Q. And how many did you have as the lowest number on your payroll?

A. Twenty-four.

Q. So employment and work varies from day to day almost?

A. Definitely.

Q. Now, at the time you visited the offices of the Bay Cities Metal Trade Council, Mr. Gra-

(Testimony of Warren C. Graham.)

ham, you told the A. F. L. representatives, whom you met on that occasion, that Mr. Lehaney had been authorized to enter into collective bargaining agreements on behalf of the Graham Ship Repair Company, isn't that right?

A. I didn't use the past tense. The first time I had mentioned it even to Lehaney was at that meeting.

Q. I say, is authorized or was authorized.

A. I said, "I'll authorize Lehaney to sign."

Q. And what time of the day was this when you visited the offices of the Bay Cities Metal Trades Council?

A. I don't recall.

Q. Now, after this conversation you had with Mr. Smith on [64] the 5th day of January, did you have any further conversations with him, before the 15th of, or thereabouts, of January?

A. I do not recall any, no.

Q. He didn't call on you?

A. Not that I remember, no.

Q. Now, will you state whether or not on or about January 25th, there was a strike among the machinists employed at your yard?

Mr. Sapiro: Object to that as calling for a conclusion. Let him tell us what happened.

Trial Examiner Myers: Overruled.

A. I was kept informed by Mr. Lehaney and Close as to what was going on, and their statement to me was that the A. F. L. men were in the yard and the C. I. O. men would not remain, and they left.

(Testimony of Warren C. Graham.)

Q. Isn't this the fact, Mr. Graham, that the C. I. O. machinists were not laid off by the Graham Ship Repair Company, but that upon the hiring of A. F. L. machinists, the C. I. O. machinists left the job?

A. That is my understanding. [65]

Redirect Examination

By Mr. Royster:

Q. Mr. Graham, on January 25, 1945, when A. F. L. machinists were brought into work, did you not know, as an employer, that C. I. O. and A. F. L. machinists don't work side by side in Alameda County?

A. I was told then at that time that they wouldn't.

Q. Did you have any information in that respect before that date?

Mr. Janigian: Object to the question on the grounds it's incompetent, irrelevant, and immaterial whether they would work or would not work together.

A. Ships of the merchant service such as Liberty ships, seagoing tugs, combat vessels of the Navy, such as LCI's, that is Landing Craft Infantry, the land craft mechanized, other yard craft belonging to the Navy, and flotilla—small flotilla flag ships as used in combat. [66]

Q. The merchant ships on which you make repairs are all seagoing vessels, are they not?

A. Yes, sir.

(Testimony of Warren C. Graham.)

Q. Not used in local transportation around the bay? A. Yes, that is correct.

Q. And the combat craft upon which repairs have been made, do you know whether or not they have been damaged in combat at some far off spot?

A. We have not had one in the yard yet that is damaged in actual combat.

Q. You testified in response to a question from Mr. Janigian that the payroll, the number of employees on the payroll fluctuated greatly from, I believe, a low of twenty-four, to a high of four hundred seven. Can you tell me when you had only twenty-four employees on the payroll?

A. During the time we were having this trouble.

Q. Well, can you be more specific?

A. Which was about shortly after the 26th, perhaps a week later, or a week or two later.

Trial Examiner Myers: 26th of what?

The Witness: Of January.

Trial Examiner Myers: 1945?

The Witness: I recall better now. It was approximately the middle of February, approximately the middle of February, between the 10th and 15th of February.

Q. (By Mr. Royster): Mr. Graham, is it not a fact that on your payroll for the week ending January 7th, 1945, you had approximately fifty employees? [67]

A. That would be approximately correct.

Q. That is my question, approximately.

(Testimony of Warren C. Graham.)

A. Yes.

Q. And on the payroll period for the week ending January 14, 1945, approximately one hundred thirty-three employees?

A. That would be approximately correct.

Q. And on the payroll period ending January 21, 1945, approximately one hundred eighty-two employees?

A. You're going pretty rapid.

Q. I'm asking for an approximation.

A. Just approximately, yes.

Q. And on the payroll for the period ending January 28th, 1945, approximately three hundred twenty-nine employees?

A. What date was that?

Q. January 28th.

A. It was during the latter part of November, between the 25th to the 30th——

Trial Examiner Myers: You mean January.

The Witness: January, where we were active and required about that number of employees. I think there were even more.

Q. (By Mr. Royster): And finally on the payroll of February 4, 1945, approximately four hundred twelve employees?

A. My recollection is the peak was before that. Whether that is the exact date, I'm not certain.

Q. How many employees are there on the payroll as of today, if you know? [68]

A. About two hundred and eighty-nine.

Q. On January 2, 1945, Mr. Graham, when, as you testified you had a conference with Mr. Ro-

(Testimony of Warren C. Graham.)

tell, at which conference Mr. Lehaney also was present, did you tell Mr. Rotell of your agreement with the Navy, whereby you obligated yourself to hire employees of Judson-Pacific War Industries?

A. No.

Q. Do you know of your own knowledge, Mr. Graham, when this alleged contract with Bay Cities Metal Trades Council was signed?

A. No, sir.

Q. You were present, were you not, when Mr. Johnson testified earlier this day? A. Yes, sir.

Q. Do you recall his testimony to the effect, that about the middle of January he came to your yard and entered into a conference with you, Mr. Lehaney, and perhaps one or two others?

A. Yes, sir.

Q. At which time there was discussion with respect to the signing—to a signed contract with the Bay Cities Metal Trades? A. Yes, sir.

Q. Do you recall the date of that occasion?

A. My recollection of it is that it was the 16th of January.

Q. Assuming, then, your recollection to be correct, that the 16th of January was the date of this conference, when was the A. F. L. Bay City Metal Trades Council contract signed with respect to that date, had it just been signed, or a [69] week before?

A. Of my own knowledge, I have no direct knowledge, except what I was told.

Trial Examiner Myers: Who told you?

The Witness: Lehaney.

(Testimony of Warren C. Graham.)

Trial Examiner Myers: What did he say?

The Witness: That it was around the 13th or 15th, the exact date I don't recall.

Trial Examiner Myers: Of January?

The Witness: January, yes.

Q. (By Mr. Royster): After the 13th, or after the contract was signed, whether it be the 13th or 15th of January, did you make any change in the hiring of machinists?

A. Yes, we secured them through the A. F. L.

Q. When did you start securing them through the A. F. L.?

A. On or about the 26th of January.

Q. Did you hire any machinists between the date of the signing of the Bay Cities Metal Trades Council and the 26th of January?

A. My recollection is we did.

Q. From whom—or rather, did you hire Local 1304 machinists during that period? A. Yes.

Mr. Janigian: Object to it on the ground it's leading and suggestive.

Trial Examiner Myers: Overruled.

Q. (By Mr. Royster): Did you notify any workman in the yard, after the signing of this contract, to the effect that a closed shop contract existed with the Bay Cities Metal [70] Trades Council?

A. Not to my knowledge, no.

Mr. Royster: That is all.

Trial Examiner Myers: Any questions, Mr. Stimmel?

(Testimony of Warren C. Graham.)

Mr. Stimmel: No questions.

Trial Examiner Myers: Mr. Janigian?

Mr. Janigian: I have some questions.

Trial Examiner Myers: Go ahead.

Recross Examination

By Mr. Janigian:

Q. You said that from the time the A. F. L. contract was signed to January 26th machinists were hired; you said, I understand, there were 1304 machinists? A. Yes.

Q. You don't know of your own knowledge whether they were 1304 or any other type of machinist, do you?

A. I heard them call the Twin Oaks number which is the C. I. O. hall, and asks for machinists to be sent, whether they came from there or not, I don't know.

Q. I see. But you didn't talk to these men to ascertain what their affiliations were?

A. No, no.

Mr. Janigian: That is all. [71]

Trial Examiner Myers: Will you please call your next witness, Mr. Royster.

Mr. Royster: Before doing so, Mr. Examiner, I'd like to offer in evidence as Board's Exhibit next in order the answer filed in this proceeding by Bay City Metal Trades Council.

Trial Examiner Myers: Any objection, Gentlemen?

Mr. Stimmel: What is the document?

Mr. Sapiro: The answer of the Bay City Metals.

Trial Examiner Myers: There being no objection, the paper is received in evidence, and I'll ask the reporter to please mark it Board's Exhibit 4.

(Thereupon the document above referred to was marked Board's Exhibit 4 and received in evidence.)

(Board's Exhibit No. 4 set out in full on page 15 of this Record.)

Trial Examiner Myers: Now, what about these other formal papers that were offered in evidence this morning?

Mr. Sapiro: Only for identification so far.

Mr. Royster: Mr. Examiner, will you indulge me for thirty seconds, and I'll have an answer on that?

Trial Examiner Myers: Very well.

Mr. Royster: I'm advised that there is now no [73] objection on the part of the individuals who signed the individual complaints, to their names being identified at this time?

Trial Examiner Myers: All right, who are they?

Mr. Royster: I'll state the names on the record. The individual charge filed under date of January 3, 1945, was signed by Frank Shaffer. And the individual charge denominated first amended charge and signed March 7, 1945, was signed by E. T. Hostetler.

Trial Examiner Myers: Now, is there any ob-

jection to these papers going in evidence, Gentlemen?

Mr. Janigian: No objection.

Mr. Stimmel: No objection.

Trial Examiner Myers: There being no objection, the papers are received in evidence, and I'll ask the reporter to please mark them as Board's Exhibit 1(a) through 1(e), inclusive, and Board's Exhibit 2 and 2(a).

(Thereupon, the documents heretofore marked Board's Exhibit 1(a), 1(b), 1(c), 1(d), 1(e), and Board's Exhibit 2 and 2(a) for identification were received in evidence.)

(Board's Exhibits 1(b), 1(c), 1(d), 1(e), and Board's Exhibit No. 2 and 2(a), set out in full on pages 1 to 14, inclusive, of this Record.)

JAMES W. CLOSE,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined, and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: James W. Close.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: C-l-o-s-e.

(Testimony of James W. Close.)

Trial Examiner Myers: And where do you live, Mr. Close?

The Witness: 4154 Mountain View Avenue, Oakland.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Royster.

Q. (By Mr. Royster): What is your occupation, Mr. Close?

A. Hull superintendent.

Q. And who is your employer?

A. Mr. Graham, Graham Ship Repair.

Q. How long have you been employed by Mr. Graham?

A. Since he operated the plant, since he took over the plant.

Q. And approximately when was that?

A. 1st of January, of this year.

Q. Who was your prior employer?

A. Walter W. Johnson.

Q. And how long were you employed by Mr. Johnson?

A. From March, 1943, up until the 1st of January, '45.

Q. During your employment by Mr. Johnson, was there another [75] name given to the company for which you were employed?

A. Judson-Pacific War Industries, plant No. 2.

Q. Where is plant No. 2 of the Judson-Pacific War Industries located with respect to the place where you now work? A. Identical.

(Testimony of James W. Close.)

Q. And what was the nature of your employment with Judson-Pacific War Industries?

A. General superintendent and plant manager.

Q. Now, directing your attention, Mr. Close, to the closing weeks of December, 1944, was there any changes made with respect to employment of machinists? A. None whatsoever.

Q. Were machinists employed in the yard where you now work in the last two weeks of December, 1944? A. No, none.

Q. By your answer to that—strike that. Were machinists doing any work at the yard during the last two weeks of December, 1944?

A. There was very little done. I don't recall just the exact amount of men involved, but there was possibly a little maintenance work only.

Q. Well, I'll get around to the question that I should have asked in the first place. Were machinists on the payroll during the last two weeks of December, 1944? A. Yes.

Q. Do you happen to know the names of the machinists who were on the payroll at that time?

A. I would have to check to be positive, but I'm pretty [76] sure, in fact I know Mr. Hostetler was one, and I know that Mr. Jim Potter, he was on the payroll, and now I would have to check the clearance records to find out the balance of them.

Q. Do you know whether or not Mr. Ashcraft was on the payroll in the, I'll make it the last week of December, 1944?

(Testimony of James W. Close.)

A. Ashcraft, I don't recall the name. I could probably know the man if I seen him.

Q. Now, on the last day of December, 1944, December 31, were any machinists discharged?

A. No.

Q. Had any such discharges taken place would you in the ordinary course of your duties, have been advised of them? A. That is right.

Q. Do you know James B. Smith?

A. I do.

Q. Did you have a conversation with Mr. Smith in January, 1945? A. Yes, sir.

Q. Will you relate to us the first of those conversations, when it took place, approximately?

A. It was the early part of January, the date, I don't recall.

Q. Where did it take place?

A. In my office, at the plant. I believe Mr. Lehaney and Mr. Smith was present at the time. I think the conversation went on that Mr. Smith asked Mr. Lehaney to adopt his policy which machinists he was going to use. The [77] question was brought up at that time which machinists they were going to use, whether A. F. L. or C. I. O., and Mr. Smith asked him at that time to adopt his policy and then call him later.

Q. Did Mr. Lehaney make any response to that, that you now recall?

A. Only that he would think it over.

Q. Did you have a subsequent conversation with Mr. Smith?

(Testimony of James W. Close.)

A. Over the phone several times, yes.

Q. Will you relate to us when the first phone conversation took place, if you recall?

A. I think the first phone conversation would be around, some time a little before the middle of January, regarding a C. I. O. machinists' contract.

Q. And what was that contract?

A. I asked Mr. Smith to prepare a contract to bring in the yard for signature.

Q. And a contract covering any specific group of employees? A. The machinists only.

Q. And did Mr. Smith reply to you?

A. He said he would get the contract up.

Q. Now, did you have a subsequent conversation with Mr. Smith after this one you have just related?

A. Yes, I talked to Mr. Smith two or three times after that.

Q. Do you recall talking to Mr. Smith on or about the 17th day of January, 1945?

A. Well, around about that time, I don't recall the exact dates. [78]

Q. Was that a telephone conversation?

A. Telephone conversation.

Q. Can you give us the substance of that conversation?

A. It was again regarding the contract.

Q. A contract relating to what?

A. The contract relating to the C. I. O. machinists for use in the yard.

(Testimony of James W. Close.)

Q. And what did you tell Mr. Smith with respect to that contract?

A. I asked Mr. Smith if he had the contract dated or ready; if not, I wished he could date that as of the 12th of January.

Q. This conversation being subsequent to the 12th of January?

A. After the 12th of January, that is right.

Q. And what was Mr. Smith's reply?

A. Mr. Smith's reply says—told me he would.

Q. Did you have any instructions from Mr. Lehaney with respect to any of the phone calls you made to Mr. Smith? A. I did.

Q. And what was that instruction?

A. The instruction was to get Mr. Smith to have that contract drawn up prior to the 15th of January, and get it in the office for my signature.

Q. With respect to the contract in which, as you testified, you suggested to Mr. Smith that he sign a contract dated the 12th of January—

A. (Interposing) That is right.

Q. Was that your idea? [79]

A. That was my own idea.

Q. Now coming to the—well, I'll ask you this: There has been testimony in this proceeding that along perhaps the 15th of January there was a contract signed between the Company and Bay Cities Metal Trades Council. Do you have any knowledge of the signing of such a contract?

A. None whatsoever, no, sir.

(Testimony of James W. Close.)

Q. Did Mr. Lehaney ever tell you that such a contract had been signed? A. He did.

Q. And do you recall approximately when this information was given you?

A. No, I don't recall, Mr. Royster.

Q. Can you place it with respect to the telephone call you made to Mr. Smith asking that he sign a contract dated January 12?

A. No, I can't. The only thing was in discussion at that time was the machinists contract.

Q. Now, directing your attention to the 25th day of January, this year, were you given any instruction on that day with respect to machinists?

A. I was.

Q. And will you tell us what that instruction was?

A. Yes. Mr. Lehaney come back to the office around about 11 o'clock and told me that I would have to get the C. I. O. machinists out of the yard by 11:30, if not, that the Bay Cities Metal Trades would pull the rest of the craft out of the yard.

Q. This was about 11 o'clock A.M. on that date, you say? A. Yes, sir, A.M.

Q. And what did you do, if anything?

A. I done nothing. I let the matter slip until later on in the day, later on in the afternoon.

Q. And later on in the afternoon did you take any action?

A. Yes, I told the machinists, I told Mr. Hostetler that the A. F. of L. had a contract in the yard,

(Testimony of James W. Close.)

and we were to use A. F. L. machinists from that time on.

Q. Did you say anything to Mr. Hostetler about how that would affect his employment?

A. I didn't.

Q. Did you have a conversation with any of the machinists who were working with Mr. Hostetler on that day?

A. Well, there were two or three of them in the bunch, I think, when I walked up to Mr. Hostetler, otherwise no personal conversation.

Q. Do you recall about what time of the day that was on the 25th?

A. Yes, around about 6 o'clock at night.

Trial Examiner Myers: Were these men that you spoke to, or present when you spoke to Hostetler, C. I. O.?

The Witness: That is right, sir.

Trial Examiner Myers: C. I. O. machinists?

The Witness: That is right, sir.

Q. (By Mr. Royster) From January 1—no, strike that. From the time that you began your employment at the location where you're now working, that is, at 501 First Street in Oakland, until 6 P.M. on the evening of January 25, 1945, [81] were any A. F. L. machinists employed there?

A. One. Yes, I beg to correct that. There was one man. He was out of the Auto Mechanics Local for a maintenance man on welding machines.

Q. And about when was that, do you recall?

A. That was in about June of 1944.

(Testimony of James W. Close.)

Q. About ten months ago?

A. That is right, sir.

Trial Examiner Myers: How long did he work for the company?

The Witness: About three months. He had a dual card. He belonged to the Pipe Fitters and also the Auto Mechanics Local.

Q. (By Mr. Royster): What has the practice been during the time of your employment at the location that we have been speaking of, both under Judson and under Graham, up until January 25, 1945, with respect to the hiring of machinists?

Mr. Janigian: Object to the question, insofar as it would relate to the practice prior to the operation of the yard by Graham.

Trial Examiner Myers: Overruled.

A. All C. I. O. machinists, 1304.

Q. Mr. Close, are you familiar with the type and character of vessels that are brought to the yard for repair? A. I am.

Q. Can you tell us—well, for example, a few of the vessels that have been worked on in the past two months?

A. Yes, sir. We have had Liberty ships belonging to Intercoastal and Steamship Company, cargo vessels for all over [82] the world.

Trial Examiner Myers: What Intercoastal Steamship Company?

The Witness: Beg pardon?

Trial Examiner Myers: What Intercoastal Steamship Company?

(Testimony of James W. Close.)

The Witness: It's the Intercoastal Steamship Company, their offices are right here in San Francisco.

Q. (By Mr. Royster) That is the name of the company?

A. That is the name of the company. Then we have at the present time tug boats built by the Maritime Commission, turned over to the War Shipping Administration and being operated by Moran Tug Company, they're used for tows and convoys and towing equipment all over the world. We have the L. S. M. type vessels which are a miniature heavy-landing craft used for tanks and troops, go all over. We have some Navy house barges that are used for quartering personnel on big conversion jobs, which is the bay work around here. Then we have worked on some L. C. I's flotilla command Navy ships going to the war zone. At the present time we have one Great Lakes coal barge, which was taken over by the Navy, which tows cargo all over the world. That about sums it up.

Mr. Royster: I believe that is all.

Trial Examiner Myers: Any questions, Mr. Stimmel?

Cross Examination

Q. (By Mr. Stimmel) Mr. Close, did you at any time post a notice up in the yard that the C.I.O. men would not be [83] employed after the 25th?

A. No, sir.

Q. Did you ever post up a copy of any contract with the A. F. L.?

A. No, sir.

(Testimony of James W. Close.)

Q. In the yard? A. No, sir.

Q. Did you ever tell any man individually that his employment would terminate by reason of his affiliation with any union? A. No, sir.

Mr. Stimmel: That is all.

Trial Examiner Myers: Mr. Janigian?

Cross Examination

Q. (By Mr. Janigian) Mr. Close, you testified that at least two machinists were employed during two pay roll periods between December 19 and January 1st? A. That is right.

Q. That is, December, 1944, and January 1, 1945? A. That is right.

Q. They weren't employed during that entire period, were they, Mr. Close?

A. They were never taken off the pay roll; in other words, they were on the pay roll, but they were on a temporary lay off basis.

Q. That is the point.

A. They were on temporary lay off as were the rest of our employees for the Judson-Pacific War Industries. [84]

Q. But they were doing no work during those two weeks? A. That is right.

Q. And so they were not at the plant working between December 19 and January 1?

A. Not the entire personnel, no.

Q. I'm talking about the machinists.

A. I would have to check my records thoroughly to find out. I can tell you every day that every

(Testimony of James W. Close.)

man was in that plant. There was one or two there off and on.

Q. But these two persons were kept on the pay roll, but were not working during the two-week period? A. During the entirety, yes.

Q. And is it your recollection that during those two weeks between December 19, two weeks or thereabouts, between December 19 and January 1, no machinists were actually working at the plant of the Judson War Industries?

A. On productive work, no; plant maintenance, off and on, yes.

Q. Off and on? A. Yes.

Q. And you don't know whether they worked one day or two days?

A. I couldn't tell you. I'd have to check my records to find out for sure.

Q. Now, were you working for Walter Johnson Company or Judson-Pacific Company?

A. Judson-Pacific War Industries.

Q. And did you ever work for Walter Johnson Company? [85] A. Never.

Q. You were hired by Mr. Graham as of January 1st, is that right? A. That is right.

Q. You were hired first in what capacity?

A. Same capacity I have right now, hull superintendent.

Q. Did you do the hiring?

A. All of it, that is, I didn't do the hiring myself, no, very little of the hiring myself.

(Testimony of James W. Close.)

Q. Well, who put the requisitions to the various unions or other sources for help?

A. Each individual craft foreman.

Q. There is testimony in the record that machinists were first employed on January the 3rd.

A. That is about right.

Q. 1945. A. That is about right.

Q. When were other craftsmen first employed?

A. Around about the same time, might have been one day difference on the rigging crew for tying vessels up.

Q. They would have been on the job one day ahead? A. One day ahead, yes, sir.

Q. And from which source were these other employees obtained, do you know?

A. From which source?

Q. Yes.

Trial Examiner Myers: You mean other than—

Q. Other than machinists.

A. I want to specify that A. F. L or C. I. O. do you have [86] reference to?

Q. That is right.

A. All American Federation of Labor.

Q. They were hired direct from the A. F. L.?

A. From the respective hiring halls, that is right.

Q. And that has been the practice ever since?

A. That is right.

Q. As far as you know?

A. That is right.

Q. Up to the present date?

(Testimony of James W. Close.)

A. To the present date.

Q. Just when were you instructed by Mr. Lehaney and Mr. Graham to sign a contract with 1304 covering machinists?

A. Somewhere around the middle part of the month, I don't recall the exact date.

Trial Examiner Myers: Did Mr. Graham instruct you?

The Witness: Mr. Lehaney first, and I wasn't going to take his word as final. I caught Mr. Graham as he was getting in the car and asked him, and I got the O. K. from Mr. Graham.

Q. (By Mr. Janigian) And you testified that you phoned Mr. Smith and advised him of the fact that you were ready to sign this contract on behalf of the Graham Ship Repair Company?

A. I did, that is right.

Q. And what did Mr. Smith tell you?

A. He said he would bring one down.

Q. And did he bring one down? [87]

A. No, sir.

Q. The next time you saw Mr. Smith was at this conference of about January the 17 or 16, is that right?

A. Somewhere along there, when Walter Johnson and Mr. Graham and myself were present.

Q. And Mr. Lehaney also?

A. That is right.

Q. Did Mr. Smith present a contract at that time?

(Testimony of James W. Close.)

A. At that time, no; not to my knowledge.

Q. Did Mr. Smith come back and offer you this contract, form of contract, at some subsequent time?

A. No, sir.

Mr. Janigian: I think that is all.

Trial Examiner Myers: Any redirect?

Re-Direct Examination

Q. (By Mr. Royster) Just this, your Honor: In hiring men for classifications other than machinists, is it your testimony that these men are hired through the various unions?

A. That is right.

Q. Is there a central hiring hall for Bay City Metal Trades Unions?

A. No, sir.

Q. Also with respect to your testimony concerning the telephone call to Jim Smith, in which you suggested that he bring down a contract and date it the 12th of January, what, in point of time, is the relationship between that telephone conversation and the occasion when you, Mr. Smith, [88] Mr. Johnson, and Mr. Lehaney met in the office at the yard?

A. I would say it was a few days prior to that, the date I don't remember exactly.

Q. The meeting was prior to the telephone conversation?

A. No, the meeting was after the telephone conversation.

Q. Is my recollection correct, that at this meeting Mr. Smith asked Mr. Lehaney to determine what policy he was going to follow?

(Testimony of James W. Close.)

A. On the first meeting, that is right.

Q. Well, you're speaking now of two meetings.

A. We were talking—the question I think you asked was the first meeting we had on the 5th of the month, 5th of January.

Q. Was that a meeting at which Mr. Smith was present?

A. Mr. Smith and Mr. Lehaney and myself were present.

Q. On the 5th of January?

A. Yes, sir, around about that time.

Q. And then followed in sequence several telephone calls to Mr. Smith?

A. That is right.

Q. Culminating with a call where you suggested that he sign a contract dated the 12th?

A. That is right.

Q. And then following that by a day or two was another meeting?

A. That is right.

Q. I don't believe that the conversation at this second meeting has been gotten into the record, and I'll ask Mr. [89] Close now to relate, as well as he can, what took place at this second meeting.

A. There was so much said, that would be pretty hard to recall, and I was unable to stay the entire meeting, so I couldn't absolutely make a statement for sure of the conversation of that meeting.

Q. Do you recall any of the conversation that took place then?

A. Yes, Walter Johnson's conversation, I recall that in particular; that we had been working definitely under a C. I. O. contract, and he was under

(Testimony of James W. Close.)

the impression that that C. I. O. contract would continue with the yard at that time. I do remember that coming out. And then I had to go out on one of the vessels, I don't recall exactly from there on just what did transpire.

Trial Examiner Myers: Any other questions, Gentlemen? Mr. Stimmel?

Mr. Stimmel: No questions. [90]

Re-Cross Examination

Q. (By Mr. Janigian) You said Mr. Walter Johnson said he was under the impression that his contract continued? A. That is right, sir.

Q. Is that the only thing you remember of that conversation?

A. That is about the only thing. There was several people in the office all trying to talk at one time, but I did happen to be standing very close to Mr. Johnson at the time the statement was made in reference to his old contract, and about that time I got a telephone call and had to go down to the yard.

Q. And this Mr. Johnson, you're sure, was talking about his own contract?

A. That is the only contract that I have knowledge of. I think he was.

Mr. Janigian: That is all. [91]

JAMES P. SMITH

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined, and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: James P. Smith.

Trial Examiner Myers: Where do you live, Mr. Smith?

The Witness: 2478 Rawson Street, Oakland.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Royster.

Q. (Mr. Royster) What is your occupation, Mr. Smith?

A. Business representative for Local 1304 machinists.

Q. How long have you been so employed?

A. Since 1936.

Q. And what, in general, are your duties?

A. Organizing and signing contract, negotiating contracts, settling industrial disputes.

Q. How long had Local 1304 existed as a labor organization?

A. It was disfranchised in the A. F. L. July 27th, '36, and remained independent until April the 9th, '37, at which time a C. I. O. charter was installed.

Q. Was it known as Local 1304 when it was affiliated, or when it was a local of the International Association of Machinists? A. No. 284.

(Testimony of James P. Smith.)

Q. Did you hold office in Local 1304 when it was first formed?

A. I was financial secretary and organizer.

Q. Is Local 1304 recognized by a number of employers in Alameda County as exclusive collective bargaining representative of machinists employees?

A. Some fifty odd employers, including ship yards.

Q. Can you name ship yards in Alameda County where machinist employees are required by agreement with your organization to be members of Local 1304?

Mr. Janigian: Object to the question on the ground it's incompetent, irrelevant, and immaterial.

Trial Examiner Myers: What about that, Mr. Royster.

Mr. Royster: Beg pardon?

Trial Examiner Myers: What about it?

Mr. Royster: I believe the question is material, Mr. Examiner, for this reason: That one of the allegations in this complaint is that the machinists constitute a separate, appropriate bargaining unit.

Trial Examiner Myers: I mean, the names of these other companies.

Mr. Royster: Well, it goes to the weight of his testimony.

Trial Examiner Myers: I'll sustain the objection.

Mr. Royster: All right.

(Testimony of James P. Smith.)

Trial Examiner Myers: Is Oakland in Alameda County?

The Witness: Yes, sir.

Q. (By Mr. Royster) Well, is there in operation any ship repair yard in Alameda County, other perhaps than the one involved in this proceeding, where all machinists are not required to be members of Local 1304? [93]

A. Only one with whom we're in negotiations, and that is Bethlehem, however, they must be members of our local, or they don't work there. We still recognize that even without a contract.

Q. Are you acquainted with Walter W. Johnson, who testified this morning? A. Yes, sir.

Q. Have you ever had any business dealings with him, you as representative of Local 1304?

A. Negotiated and signed the first contract with the original yard, Judson War Products.

Q. I show you Board's Exhibit 3(a) for Identification, and ask you if you can identify it?

A. Yes, sir, that is the contract we signed.

Q. What is it?

A. That is the contract we signed.

Q. With whom?

A. Walter W. Johnson, representing Judson-Pacific War Industries.

Q. And about when was that contract signed?

A. August 14th, '42.

Q. And I show you Board's Exhibit 3(b) for identification, and ask you if you can identify that?

A. Yes, sir, that is the Pacific Coast agreement,

(Testimony of James P. Smith.)

which is a part of the master contract signed by —on the same date by Mr. Johnson, representing Judson-Pacific War Industries, and myself representing the union.

Q. Is it your testimony that this document was signed on August 14th, 1942? [94]

A. Yes, sir.

Q. And I show you Board's Exhibit 3(c) for identification, and ask you if you can identify that?

A. Yes, sir, that is the supplement to the repair agreement signed on the same date by Mr. Johnson, representing Judson, and myself representing the union.

Q. And did you testify, was signed on the same date as the other two documents?

A. Same date.

Q. August 14th, 1942?

A. That is right.

Trial Examiner Myers: Are you offering those contracts in evidence?

Mr. Royster: Yes. I offer those in evidence, Mr. Examiner.

Trial Examiner Myers: Any objection?

Mr. Janigian: Yes, I object to it on the ground that these contracts are incompetent, irrelevant and immaterial since the evidence in this case affirmatively shows that the Graham Ship Repair Company is not a successor of the Judson War Industries, Inc., did not agree to assume these collective bargaining agreements, consequently these agreements are wholly immaterial, cannot be said to be

(Testimony of James P. Smith.)

binding upon the Graham Ship Repair Company or upon any union other than 1304.

Trial Examiner Myers: I'll overrule the objections, and receive the papers in evidence, and ask the reporter to please mark them as Board's Exhibit 3(a), (b), and (c) respectively. [95]

(Thereupon the documents heretofore marked Board's Exhibit 3(a), (b) and (c) for identification were received in evidence.)

BOARD'S EXHIBIT No. 3 (a)

MASTER CONTRACT

UNION AGREEMENT

This Agreement, made and entered into this 14th day of August, 1942, by and between Judson Pacific War Industries, hereinafter called "Employer", and East Bay Union of Machinists, Local 1304 of the United Steelworkers of America, affiliated with the Congress of Industrial Organization.

Witnesseth:

1. Scope of Agreement.

This agreement shall apply to all work and activities of the employer in connection with the construction of new vessels on the Pacific Coast in connection with the National Defense Program, including new vessels to be constructed for the U. S. Navy, U. S. Maritime Commission, and for foreign governments with the approval of the United States Government.

(Testimony of James P. Smith.)

A "new vessel" shall be construed to be any newly-constructed floating structure prior to its completion, final acceptance and employment in the service for which it has been constructed. "Construction of new vessels" (as differentiated from repair) shall include substantial rebuilding of a vessel prior to service in order to adapt it to a use different from that for which it was previously planned, and shall not be deemed as repair work until such vessel has made a passenger or cargo-laden voyage.

2. Hiring of Men.

It is hereby agreed that all employees covered by this agreement who come under the jurisdiction of the Machinists Union shall be members of the East Bay Union of Machinists.

The Union agrees, on requisition of the Employer, to furnish competent workmen in the classifications covered by this agreement for the prosecution of the work covered by this agreement. The Employer may refuse to employ and may discharge any employee for any just and sufficient cause.

Union agrees that the workmen to be furnished to the Employer under this agreement shall be willing to, and shall, submit to the making of such records for the purposes of identification as are, or may be, required by the United States Government in connection with the National Defense Program.

Only citizens of the United States need be employed and the Employer shall have the right to require satisfactory evidence of such citizenship.

(Testimony of James P. Smith.)

If, after Employer has placed requisitions for workmen with the Union, signatory hereto, the Union shall fail to supply competent workmen within forty-eight (48) hours thereafter, employer shall be free to hire the necessary workmen when and where it chooses without regard to Union membership; provided, however, that such workmen, so employed, shall be required to secure a clearance card from the Union before starting work.

In the event such workmen fail to make application to the Union within the period of time prescribed by such Union, they shall be replaced by members of the Union when they become available.

* * * *

6. Wage Scales.

Employer agrees to pay to its employees and the union agrees that its members employed by Employer will accept the wage scales for the various classifications set forth and contained in the Schedule of Wages in Exhibit "A" attached hereto; provided, however, that nothing contained in this agreement shall operate to reduce the wages of any employee who is now or who has within six (6) months been employed by Employer; provided, further, that any employee who is transferred from ship repair work to new ship construction work, as herein defined shall receive not less than the wages now being paid by Employer to other employees in the same classification in new ship construction.

The wage scales herein established shall be con-

(Testimony of James P. Smith.)

sidered as minimum scales and shall not prevent the payment of higher wages to premium men.

* * * *

20. Jurisdiction.

The Union agrees that in the event any jurisdictional dispute shall arise between the various trades Unions with respect to the jurisdiction over the work or any classification of employment, whether or not included in the schedule attached hereto, such dispute shall be settled by the Unions without permitting the same to interfere in any way with the progress and prosecution of the work hereunder. Pending the settlement of such disputes, the work shall continue on the same basis as it was being performed at the time the jurisdictional dispute arose, unless the Unions otherwise agree and furnish men to perform the work.

* * * *

22. Duration of Agreement.

All provisions of this agreement shall continue in force and effect during the period of the National Emergency, as proclaimed by the President of the United States, and/or the period of two years, whichever is the longer, and shall continue in force and effect thereafter from year to year unless either party shall desire a change and shall give the other party notice in writing of the proposed changes at least thirty (30) days prior to the expiration of any year; provided, however, that on demand of Labor at the end of the first year's operation under this

(Testimony of James P. Smith.)

agreement, and on demand of either party, every six (6) months thereafter, the wage scales herein agreed to shall be reviewed by the parties. If the cost of living, as shown in the "Index Numbers of Cost of Goods Purchased by Wage Earners and Salaried Workers in Large Cities", published by the United States Bureau of Labor Statistics, United States Department of Labor, shall have changed at the time of the review from the cost of living at the time of the making of this agreement by five per cent (5%) or more, the wage scales shall be correspondingly adjusted.

In the event the necessary data is not obtainable at the date of review, it may be secured at a later date and the wage adjustment shall be made effective retroactively to the date of review.

* * * *

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

For the Employer:

JUDSON PACIFIC WAR
INDUSTRIES,
/s/ WALTER W. JOHNSON,
G. M.

For the Union:

JAMES R. SMITH,
B. A. Local 1304.

SCHEDULE "A"

Machinists	\$1.20
Machinists Helpers95

(Testimony of James P. Smith.)

BOARD'S EXHIBIT No. 3 (b)

UNION SHIP REPAIR AGREEMENT

This Agreement, dated April 1, 1942, between Employers signatory hereto and engaged in ship repairs in the San Francisco Area, and the East Bay Union of Machinists, Local 1304 U. S. of A. affiliated with the Congress of Industrial Organizations.

Witnesseth:

1. Scope of Agreement—The terms hereinafter expressed shall be incorporated in contracts to be executed by all Employers parties hereto with the East Bay Union of Machinists Local 1304.

2. Wages—The wage scales for ship repair work on the Pacific Coast are hereby fixed at the scales set forth in Schedule "A" of the Master Contract covering new ship construction, plus 11.6%.

* * * *

4. Duration of Agreements—The duration of the agreements shall be for the period of two years or for the period of the National Emergency as proclaimed by the President of the United States—or which ever is longer, and said agreements shall continue in force and effect thereafter from year to year unless either party shall desire a change in which event, the party desiring the change shall give the other party notice in writing of the proposed change or changes at least thirty days prior to the expiration of such year; it being expressly understood, however, that on the demand of Labor thirty days prior to April 1, 1942, and on demand of either

(Testimony of James P. Smith.)

party every six months thereafter, the wage scales in said agreements shall be reviewed by the parties. If the cost of living, as shown in the "Index Numbers of Costs of Goods Purchased by Wage Earners and Salaried Workers in Large Cities", published by the United States Bureau of Labor Statistics, United States Department of Labor, shall have changed at the time of the review from the cost of living at the time of the making of this agreement by five per cent or more, the wage scales shall be correspondingly adjusted. In the event the necessary data is not obtainable at the date of review, it may be secured at a later date and the wage adjustment shall be made effective retroactively to the date of review.

* * * *

7. It is expressly understood that existing working conditions in the various districts shall continue in force and effect until changes by mutual agreement except as herein specifically otherwise provided.

In Witness Whereof, the parties hereto have hereunto set their respective names through their respective authorized officers or representatives.

For the Employers:

JUDSON PACIFIC WAR
INDUSTRIES,
/s/ WALTER W. JOHNSON,
G. M.

For the Union:

/s/ JAMES B. SMITH,
B. A. Local 1304.

(Testimony of James P. Smith.)

BOARD'S EXHIBIT No. 3 (c)

UNION SUPPLEMENTAL SHIP REPAIR
AGREEMENT

“The following supplemental agreement is in amplification of Section 7 of the Ship Repair Agreement between Employers Signatory thereto engaged in Ship Repairs and the East Bay Union of Machinists, Local 1304, of the U. S. of A., affiliated with the Congress of Industrial Organizations.

By and between Judson Pacific War Industries and East Bay Union of Machinists, Local 1304 of the U. S. of A. affiliated with the Congress of Industrial Organization.

Section No. 1. It is hereby agreed that all employees covered by this agreement who come under the jurisdiction of the Machinists Union shall be members of the East Bay Union of Machinists, Local 1304. If the East Bay Union of Machinists Local 1304 is unable to furnish required help, any employee hired must secure a clearance through the office of the East Bay Union of Machinists Local 1304 before starting to work.

* * * *

Dated 8/14/42.

For the Employer:

JUDSON PACIFIC WAR
INDUSTRIES,
/s/ WALTER W. JOHNSON,
G. M.

(Testimony of James P. Smith.)

For the Union:

/s/ JAMES B. SMITH,
B. A. Local 1304.

SUPPLEMENT AGREEMENT

Covering employment of "Trainees" in the jurisdiction of the East Bay Union of Machinists Local 1304 U. S. of A.

By and between Judson Pacific War Industries, and the East Bay Union of Machinists Local 1304 United Steelworkers of America.

* * * *

Entered into this 14th day August, 1942.

For the Employer:

JUDSON PACIFIC WAR
INDUSTRIES,
/s/ WALTER W. JOHNSON,
G. M.

For the Union:

/s/ JAMES B. SMITH,
Local 1304.

Mr. Royster: Mr. Examiner, these documents are original documents, the only ones in the possession of the union, and I ask permission to substitute copies therefor, and to withdraw the originals.

Trial Examiner Myers: You may substitute copies. Have you got copies?

(Testimony of James P. Smith.)

Mr. Royster: I have them right here.

Q. (By Mr. Royster): Was this contract in effect at the yard now operated by Mr. Graham, the contract to which you have just testified?

A. Was it in effect?

Q. Was it ever in effect at the yard now operated by Mr. Graham? A. That is right.

Q. How long was it in effect there?

A. From the inception of the yard.

Q. Do you know when—I'll strike that. Were you notified that Judson-Pacific War Industries were ceasing operation of the yard now operated by Mr. Graham?

A. Not prior to January 1st.

Q. But you were notified?

A. I learned of it early—about the second or third of January, learned of who was representing the company, Mr. Graham, Mr. Lehaney, Mr. Vogel, obtained the hotels in which they were residing, and finally about 10 or 10:30 one night [96] was able to contact Mr. Graham.

Q. How? A. By telephone.

Q. And about what date was this?

A. Along about the third or fourth, I'd say, of January.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. And what was that conversation?

A. I identified myself over the phone, and Mr. Graham done likewise from his end, stated that we had a contract with the——

(Testimony of James P. Smith.)

Q. (Interposing): You stated this?

A. That is right, that we had a contract with the Judson War Industries, Inc.; that the employees in the plant coming under our jurisdiction were members of our organization, and had been since the inception. And Mr. Graham explained to me that he had hired Mr. Lehaney as their labor relations representative, and urged that I contact Mr. Lehaney, and that he would also notify Mr. Lehaney that I was going to contact him, which I did the following morning.

Q. Well, on the following morning then you say you contacted Mr. Lehaney?

A. That is right.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Where?

A. In Mr. Close's office first, then we went upstairs in another room and had a conversation between Mr. Lehaney and [97] myself.

Q. And what was that conversation?

Trial Examiner Myers: Which one, upstairs or downstairs?

The Witness: Well downstairs, in Mr. Close's office, was more of an introduction than anything else. We were to discuss what Lehaney's policy was going to be and what our standing was there, and then Mr. Lehaney and I went upstairs in another little office, and he asked me questions about

(Testimony of James P. Smith.)

the situation in Alameda County. I explained it to him thoroughly.

Trial Examiner Myers: Tell us what you said?

Q. (By Mr. Royster): What did you say?

A. About the shipyards over there, including the one that they had taken over, employed exclusively machinists out of our organization with the exception of Bethlehem's new yard, new construction yard, and that had been—I give him a brief history of the background of our organization, our strikes, and so on, and that it resulted in our contracts and also our labor board decisions, directives, and so on down the line that had validated our contracts up to the present time, so that he would understand what the situation was as far as hiring and dispatching of machinists in the shipyards in that area.

Q. Well, after this explanatory discussion, did you make any request of Mr. Lehaney?

A. Made a request for a continuance of our present contract with the Judson Company. He said he would have to take it up with his superiors.

Q. Did he state to you that he lacked authority to conclude an agreement with you? A. No.

Mr. Janigian: Object to counsel leading the witness at every turn.

Trial Examiner Myers: I'll sustain the objection. Don't lead him. What date did you say this was?

The Witness: I'm quite sure it was on the fifth.

Trial Examiner Myers: Of January?

(Testimony of James P. Smith.)

The Witness: Fifth of January.

Q. (By Mr. Royster): Did you receive any communication from Mr. Lehaney after this talk?

A. No, I requested him to get in touch with us when he had the information, and urged him to continue on under the present conditions until such time as he could give me an answer, which he assured me he would, and later on, along about the 15th of January, received a phone call to bring a contract down and back date it to the 12th.

Q. Let's get that a little more in particular. About the 15th of January you state you received a phone call from home?

A. I beg your pardon, get this in: There was two phone calls came in the office, and I was tied up in negotiations just prior to that 15th or 16th call, at which time I talked to Mr. Close.

Q. Well now, the two phone calls came into the office asking for you? A. That is right. [99]

Q. On the 12th, 13th, 14th, somewhere along in there?

A. Somewhere around in there, I'll say the 13th or 14th.

Trial Examiner Myers: But you weren't there?

The Witness: I was in other grievance.

Trial Examiner Myers: But you weren't there?

The Witness: I was not in the office, no, sir.

Trial Examiner Myers: And you didn't talk to anybody?

The Witness: No, sir.

Trial Examiner Myers: The first time you

(Testimony of James P. Smith.)

talked to anybody was around the 16th or 17th of January?

The Witness: Somewheres around the 16th or 17th, yes.

Q. (By Mr. Royster): And to whom did you talk on that occasion? A. Mr. Close.

Q. And what was that conversation?

A. Mr. Close stated to bring a contract down, and that Mr. Lehaney had requested we back date it to January 12th.

Q. And what was your reply?

A. My reply was at first that I would.

Trial Examiner Myers: Tell us the whole conversation?

The Witness: That was about all there was to the conversation.

Trial Examiner Myers: Well, you said, at first you said, "I would." Did you change during that conversation?

The Witness: Yes, I got to thinking it over, that to move into some kind of litigation, I wanted this contract dated—the contract that we have at the present time continued.

Trial Examiner Myers: Neved mind what went on in your [100] mind. What did you say to Close in that conversation?

The Witness: I didn't say any more to Close on that conversation on the telephone, that closed there. I gave you the substance of that conversation.

Trial Examiner Myers: All right, you said you would?

(Testimony of James P. Smith.)

The Witness: That is correct.

Trial Examiner Myers: All right, go ahead.

Q. (By Mr. Royster): Did you have any subsequent conversation with Mr. Close then on the telephone? A. No.

Q. Did you have any subsequent conversation with Mr. Graham with respect to a contract for machinists?

A. Only the meeting that morning with Mr. Graham, Mr. Lehaney, Mr. Johnson, Mr. VanCuren, my associate, Mr. Close was in for awhile, and myself.

Q. And will you give us the date of that meeting? A. It was on or about the 17th.

Q. And with respect to the telephone call from Mr. Close about which you have just testified, did that telephone call precede this meeting?

A. That is right.

Q. Will you tell us first where this meeting was of the 17th?

A. It was in a little side office, I think it's what you might term the yard superintendent's office; it wasn't in the main office, it was off to the side.

Q. The office of the Graham Ship Building Company? A. That is right.

Q. And what was said there? [101]

A. I asked for the signing of a contract, or the continuing of our old contract.

Mr. Janigian: Continuing what?

The Witness: Continuing of our—we assumed we had a contract at the time, continue the contract,

(Testimony of James P. Smith.)

continued the practice that had been followed through up until that time that the machinists be hired through our organization, and I asked if—or Lehaney stated that that couldn't be done, there was a contract signed and I says, "Covering the men in our yard, the men in your yard, who are members of our union?" He said, "That is right." I said, "Well, we're not going to go for any back-door contracts." And he said, "That is a God damned lie." And I said, "No, it's not, the employees in the plant are members of our union, and we're certainly not going to let you pull off a stunt like that, have a contract covering men from some other union, that doesn't cover any man in that jurisdiction in this yard."

Q. (Mr. Royster): Were you shown any contract on this date? A. No.

Q. Did you offer on this date—I'll strike that. Was any further reference made on the date of this meeting and at this meeting with respect to the contract about which you and Mr. Close talked on the telephone?

A. At this meeting Mr. Johnson urged Mr. Graham and Mr. Lehaney to continue on with the contract we had, that the relationship between his company and our organization had been most friendly, and that stepping out of line on that [102] would only create a disturbance because of the fact that the yards on the estuary were all—all machinists were hired through our organization, and Mr. Graham at that time requested to take it under ad-

(Testimony of James P. Smith.)

visement, and meantime the people were to be hired through our union.

Q. Did you make a subsequent visit to Mr. Graham's yard?

A. Yes, I was down there a couple of times in the yard, just not for a meeting, but just to see how things were going.

Q. Were you there on January 25, 1945?

A. Yes, sir.

Q. And what occasioned your visit on that date?

A. I received a phone call around about six o'clock that afternoon that the A.F.L. were bringing machinists in to take over the swing shift at seven o'clock that night.

Q. From whom did you receive this phone call?

A. It started in the yard.

Q. What is his name? A. Shaffer.

Q. And as a result of this phone call what did you do?

A. Hopped in the car, and immediately went to the yard.

Q. And upon arrival at the yard what did you do?

A. Went into Mr. Lehaney's office and told him——

Trial Examiner Myers: Who did you see?

A. Mr. Lehaney's office, told him I understood he was bringing A.F.L. machinists in, and he says, "That is right." And I said, "Well, you know that is contrary to the situation we're working under." And he says, "Well, your men are out." And I

(Testimony of James P. Smith.)

said, "Have you any [103] objections to me going out in the yard to so inform my members?" And he said, "None whatsoever, go ahead."

Q. (By Mr. Royster): Was there any further conversation at that time between you and Mr. Lehaney? A. No, sir.

Q. And what did you do?

A. Went out in the yard and told the fellows that the A.F.L. was taking over the yard at seven o'clock that night, and that they would require them either lining up in the A.F.L. or being replaced, because the company stated they were out.

Trial Examiner Myers: Will the reporter please read it?

(The answer referred to was read by the reporter.)

Q. (By Mr. Royster): When you were talking with Mr. Lehaney on this occasion, to what group of employees did you have reference, what group of employees were you talking about?

A. The machinists and helpers employed in the yard.

Q. Since that date have you had any conversation with Mr. Lehaney? A. No, sir.

Q. Have you had any conversation with Mr. Graham? A. Yes, sir.

Q. Can you tell us approximately when?

A. I had a conversation with Mr. Graham a few days after. [104]

Q. Where? A. Beg pardon?

Q. Where?

(Testimony of James P. Smith.)

A. The the Coit Hotel, in Oakland.

Q. Was any one present other than you and Mr. Graham? A. No, sir.

Q. And what was the conversation?

A. The conversation was that Mr. Graham wanted to go into this situation, he was sorry it had come up, he wanted advice as to what legal procedure would have to take place in order to settle the controversy along those lines.

Q. Have you ever made a request for reinstatement of the C.I.O. machinists, whose employment was terminated on January 25th?

A. Yes, sir, to Mr. Graham at that time requesting the continuance of our contract or new contract, reinstating our employees, or our members rather.

Q. Since January 25, 1945, have any members of Local 1304 been employed at the Graham Shipyard? A. No, sir.

Trial Examiner Myers: You say this conversation took place a couple of days after the 25th?

A. Three or four days after the 25th.

Trial Examiner Myers: Have you spoken to Mr. Graham since then?

The Witness: Yes, once since then.

Trial Examiner Myers: When was that?

The Witness: Probably a week after that. [105]

Q. (By Mr. Royster): And what was the conversation then?

A. The conversation was that Mr. Graham wanted straightened out, that he felt that it would have to go to some appropriate government agency,

(Testimony of James P. Smith.)

and that is when we filed the charges with the N.L.R.B.

Q. Did you ask him about reinstatement?

A. Well, probably in the discussion that was brought up, not officially asked, it had already been requested two or three different times.

Q. When were the two or three different times?

A. I stated there that on the meeting approximately the 17th, again on the 25th, the first conversation with Mr. Graham, and probably the second.

Q. I said reinstatement, they didn't go out, or they wasn't discharged, or whatever you want to call it, until the 25th?

A. That is right, reinstating our members.

Q. When did you have that conversation?

A. In the first meeting with Mr. Graham, and probably the second.

Q. The second reinstatement to their jobs, I'm talking about.

A. Well, I'm answering you that it probably came up in the conversation with Mr. Graham in both instances. I know it did the first time and probably the second.

Q. You mean a couple of days after January 25th, is that what you mean?

A. I said three or four days after January 25th, the first meeting, and probably a week or ten days on the second one. [106]

Q. All right, did you ask him on February 14th and February 18th, 1945?

A. Yes, there was another meeting—I wouldn't

(Testimony of James P. Smith.)

say the exact dates. I had another meeting with Mr. Graham, and we discussed the case coming before the National Labor Relations Board on the filing of the charge, and in all probability that was discussed at that time, but I don't recall the exact conversation.

Q. (By Mr. Royster): Did you have a meeting with Mr. Graham on February 14th?

A. Around about that date.

Q. Was any one present other than you and Mr. Graham?

A. Yes, Mr. Van Curen was there.

Q. Did you on that date request that C.I.O. members, who had lost their employment on January 25, 1945, be reinstated to their positions?

A. That is right.

Q. Is your answer yes?

A. Yes. Mr. Graham stated that he had to let it go through the channels of the constituted government agency.

Q. Are you familiar with the records of Local 1304?

A. Yes, sir.

Q. In whose charge are they? [107]

A. Well, there are several officers. I happen to be in charge of the office, but they have a financial secretary and treasurer and president, and so on.

Q. Are you in charge of the—you stated you were in charge of the office?

A. That is right.

Q. Does that include charge of the records?

A. Yes, sir.

(Testimony of James P. Smith.)

Q. I'll show you this paper and ask you if you can identify it?

A. Yes, sir, that is our index cards that we have for the record of each individual member who is now or has been a member of our organization.

Q. What is the significance of the entries thereon?

A. Those are the number of months paid on the dates, and the amount paid for the month, and the page number on the day sheet.

Q. By the amount paid, amount of what?

A. Dues per month recorded right here, for machinists, \$2.00.

Mr. Royster: Will the reporter mark these cards as Board's Exhibit 5(a), (b), (c) and (d), and following?

(Thereupon the documents above referred to were marked Board's Exhibit 5(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (n) for identification.) [108]

Cross Examination

Q. (By Mr. Stimmel): Mr. Smith, after you told Mr. Close that you would bring a contract down to him, did you ever prepare a contract?

A. Yes, sir, I had it in my pocket at that meeting on or about the 17th that we described, when Mr. Graham, Mr. Lehaney, and Mr. Johnson were present.

Q. At that time did they ask you for the contract? A. No, sir.

(Testimony of James P. Smith.)

Q. Did you tell them at the time you had a contract ready? A. That is right. [115]

Q. Did you offer to deliver it to them with your signature?

A. It was in my pocket ready for signature.

Q. Did you offer it to them in response to their prior inquiry?

A. Yes, I submitted that I had the contract and was prepared to sign it.

Q. Who did you offer it to?

A. Well, the company which was represented by Mr. Lehaney and Mr. Graham.

Q. Did you offer it to Mr. Lehaney, or did you offer it to Mr. Graham?

A. I didn't come out and say, "Here, Mr. Graham, is the contract." I said, "We have a contract prepared to sign."

Trial Examiner Myers: Did you offer it to somebody?

The Witness: To the two representatives of the company.

Trial Examiner Myers: You had the paper in your hand?

The Witness: I had it rolled up in my pocket. I said, "Here is the contract ready to sign."

Q. (By Mr. Stimmel): Where was the contract, in your pocket or in your hand, when you made the offer?

A. I pulled it out and put it back again when it was turned down.

Q. Who turned it down?

(Testimony of James P. Smith.)

A. Mr. Graham said that he wanted time to go into it further.

Mr. Stimmel: That is all.

Cross Examination

Q. (By Mr. Janigian): Mr. Smith, when you had this [116] conversation with Mr. Graham some time in February, of this year, with respect to reinstatement, did you or did you not tell him that your members would not return to work and work with A.F.L. machinists?

A. I couldn't have told him that because——

Trial Examiner Myers: Will you please answer the question.

Q. (By Mr. Janigian): Did you?

A. No.

Q. Now, at any of these—during the course of any of these conversations did you express a willingness to have your men return to their former employment and work along with the other machinists, who were working there? A. No.

Q. Isn't it a fact, Mr. Smith, that you called the strike among the machinists on the 25th day of January, 1945? A. That is not correct.

Q. Was there a strike called by any of the men?

A. No, they were told that they were out. I conveyed the information to them from Mr. Lehaney.

Q. Well, it's not a fact then there exists or has existed at any time since January 25 a strike among your members at the Graham Ship Repair Yard?

A. If we'd had a strike, we'd have put a picket line up.

(Testimony of James P. Smith.)

Q. Your information is then, there is no strike and has never been a strike? A. No. [117]

Cross Examination

Q. (By Mr. Stimmel): Mr. Smith, at that meeting, when Mr. Graham and Mr. Lehaney was present, did you show them this contract you had in your pocket?

A. It was rolled, I had an elastic around it, it wasn't unrolled, around it.

Q. Did you take it out of your pocket and say, "This is a [118] labor contract"?

A. Yes, I said, "I have a contract here ready to sign," and put it back in my pocket. That was the end of it.

Mr. Stimmel: That is all.

Trial Examiner Myers: Mr. Janigian?

Mr. Janigian: No questions.

JAMES W. CLOSE—(Recalled)

Redirect Examination

Q. (By Mr. Royster): After January 25, 1945, Mr. Close, were you present when a conversation took place between Mr. Graham and Mr. Smith?

A. Yes, I was there at a portion of one of the conversations.

Q. And can you relate to us what that portion was that you heard?

Mr. Janigian: What date was this again?

Mr. Royster: All I said is subsequent to Jan-

(Testimony of James W. Close.)

uary 25th, but perhaps he can give it to us more exactly.

A. The specific date, I can't give you any specific date. [119] I just come in on a conversation, I was asked in for a few minutes, but the whole gist of the conversation was this contract again. Mr. Smith insisted that he wanted he wanted his men back in the yard, reinstated back in the yard, and a contract signed, and the men would come back to work.

Q. Did you hear Mr. Graham make a reply to that; do you recall such a reply?

A. Yes; Mr. Graham said that he wanted more time, to take the matter under advisement, think the matter over.

Mr. Royster: That is all.

Trial Examiner Myers: Could you fix the time a little better than you have?

The Witness: Well, it would be pretty hard, sir, to fix the exact time.

Trial Examiner Myers: Yes. Well, the approximate time, a week or two weeks, or a couple of days, or a month?

The Witness: I would say maybe a week or so after that 17th of January meeting, along there somewhere, a week or ten days.

Q. (By Mr. Royster): Was it before or after the time when the C.I.O. machinists' employment was terminated?

A. No, it was after the termination.

Trial Examiner Myers: How long after?

(Testimony of James W. Close.)

The Witness: Four or five days after the termination.

Trial Examiner Myers: All right.

Mr. Royster: That is all.

Trial Examiner Myers: Any questions, gentlemen?

Recross Examination

Q. (By Mr. Stimmel): Mr. Close, when this conversation took [120] place with regard to the reinstatement of the men, was anything said at that discussion with regard to the men being reinstated if the contract was signed?

A. I didn't quite get that clear, Mr. Stimmel.

Q. When this conversation took place after the 25th between yourself and Mr. Smith, with regard to the men who had left the employ of the machinists, who had left the employ being reinstated, was any conversation had between you and Mr. Smith with regard to the men being reinstated as if and when a contract was signed with the C.I.O. union?

A. Not that I recall, Mr. Stimmel.

Q. There was no discussion whatsoever on that point?

A. Not that I recall, sir.

Mr. Stimmel: That is all.

Recross Examination

Q. (By Mr. Janigian): Mr. Close, you testified just two minutes ago that Mr. Smith insisted upon the men being reinstated and a contract being signed, isn't that right?

A. That is right.

Q. And he did so advise Mr. Graham, didn't he,

(Testimony of James W. Close.)

that he wanted the men reinstated and the contract signed? A. That is right.

Q. What did he say with respect to the conditions under which the men would return to work?

A. It seemed like that was the only condition, there was the reinstatement of the contract being signed was the condition the men would return to work.

Q. The condition would be the signing of the contract? [121] A. That is right, sir.

Mr. Royster: Mr. Examiner, I have to offer in evidence, by stipulation among the parties, as Board's Exhibit No. 6 a pay roll of machinists on January 2, 5 and 25, 1945.

Trial Examiner Myers: What do you want the stipulation to cover?

Mr. Royster: It's stipulated among the parties that Board's Exhibit 6 is a correct record of machinists in the employ of the Respondent on the dates shown on the exhibit.

Trial Examiner Myers: Do you so stipulate, Mr. Stimmel?

Mr. Stimmel: We do

Trial Examiner Myers: And you, Mr. Janigian?

Mr. Janigian: Yes, so stipulated.

Trial Examiner Myers: And you, Mr. Royster?

Mr. Royster: I do.

(Thereupon the document above referred to was marked Board's Exhibit 6 for identification.)

(Testimony of James W. Close.)

Trial Examiner Myers: Now you offer the paper in evidence?

Mr. Royster: I offer the paper in evidence.

Trial Examiner Myers: Any objection to the paper going [122] in evidence, gentlemen?

Mr. Stimmel: No objection.

Trial Examiner Myers: There being no objection, the paper is received in evidence, and I'll ask the reporter to please mark it as Board's Exhibit 6.

(Thereupon the document heretofore marked Board's Exhibit 6 for identification was received in evidence.)

BOARD'S EXHIBIT No. 6

MACHINIST

Jan. 2, 1945: None.

Jan. 5, 1945—Day Shift: E. Ashcraft, Machinist; E. P. Hostetler, Machinist Leaderman; J. Potter, Machinist.

Jan. 25, 1945—Day Shift: E. Ashcraft, Machinist; G. Berness, Machinist; B. Clark, Machinist; J. Clark, Machinist; E. Hostetler, Machinist Leaderman; C. B. Lewis, Machinist; J. Potter, Machinist; R. Renner, Machinist Leaderman; F. Schaeffer, Machinist; W. Shearing, Machinist; A. Sequeirra, Machinist Helper; T. Wright, Machinist. Swing Shift: J. Hopper, Machinist; John Ross, Machinist; G. Taylor, Machinist.

Mr. Royster: Mr. Hostetler.

ELMOTH HOSTETLER,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Elmoth Hostetler.

Trial Examiner Myers: And where do you live, sir?

The Witness: 3514—14th Avenue, Oakland.

Trial Examiner Myers: You may be seated, sir. And you may proceed, Mr. Royster.

Q. (By Mr. Royster): What is your occupation?

A. Machinist.

Q. And who is your employer?

A. Hurley Marine Works.

Q. How long have you been employed there?

A. Since February 8th.

Q. Of this year? A. 1945. [123]

Q. Were you ever employed by Judson-Pacific War Industries, Inc.? A. Yes, sir.

Q. When did you begin that employment?

A. June 1st.

Q. Of what year? A. 1944.

Q. And where?

A. At yard No. 2, at 501 First Street, Oakland.

Q. What was your classification?

A. I was classed as a leaderman and assistant—also as acting foreman.

(Testimony of Elmoth Hostetler.)

Q. Over—— A. All machinists.

Q. Machinists? A. Yes.

Q. When did your employment with Judson terminate?

A. Well, so far as I know it terminated the 25th of—either the 25th or 26th of January.

Q. Of what year? A. 1945.

Q. Have you ever been employed by Mr. Graham? A. Yes, sir.

Q. And over what period was that employment?

A. Well, in that same period of time there.

Q. Well——

Trial Examiner Myers: Who paid you?

The Witness: His checks started paying me the 1st of [124] January, 1945, the first check I drew with Mr. Graham's signature on it was January 7, 1945.

Q. (By Mr. Royster): And what period did that cover?

A. That covered from the 1st of January to the 7th of January.

Q. Now, the period from December 25, 1944, through December 31, 1944, were you employed?

A. Yes, sir, I was employed.

Q. And did you perform any work during that period? A. Yes, sir, I performed work.

Q. Where were you employed?

A. I was employed at the Judson Shipyard.

Q. And how many days did you work in that period?

A. Well, I worked practically all the time with

(Testimony of Elmoth Hostetler.)

the exceptions of probably, oh, a few days when we were off temporarily a few days, I can't say just exact number.

Q. Did you ever receive a release from your employment of Judson-Pacific War Industries?

A. No, sir, I received no release at all.

Q. Was there any change in your wage rate reflected in the check you got from Graham's as compared with the checks you got from Pacific War Industries, Inc.?

A. No, sir, just the same.

Q. As an employee of Judson-Pacific War Industries did you have a clock number?

A. Yes, sir.

Q. Did you have a badge?

A. Yes, sir.

Q. Did your clock number change after January 1?

A. No, sir, stayed just the same.

Q. Did your badge change in any respect?

A. No, sir, just the same.

Q. This is after January, 1945. Are you a member of any labor organization?

A. C.I.O. 1304.

Q. Do you know the full name of that organization? Do you know whether or not that is the charging union in this case?

A. I don't get the question.

Trial Examiner Myers: Have you got any card showing that you're a member?

The Witness: Oh, yes.

Trial Examiner Myers: Will you look at it and see what it says?

(Testimony of Elmoth Hostetler.)

The Witness: I don't think I have it with me. I carry it in my tool box.

Trial Examiner Myers: East Bay Union of Machinists, Local 1304 C.I.O.?

The Witness: That is right, sir.

Q. (By Mr. Royster): When did you join that organization?

A. June 1st.

Q. Of what year? A. 1944.

Q. Have you maintained your membership?

A. Yes, sir.

Q. Since joining? [126] A. Yes, sir.

Q. At any time since June 1st, 1944, have you been in bad standing with Local 1304?

A. No, sir, I'm paid up.

Q. I'll show you Board's Exhibit 5(1) for identification, and ask you if that correctly portrays certain of your dealings with Local 1304?

A. Yes, sir, that is just exactly right.

Trial Examiner Myers: Were you a member in good standing during the month of January, 1945?

The Witness: Yes, sir.

Mr. Royster: I'll offer Board's Exhibit 5(1) in evidence.

Trial Examiner Myers: Any objection, Gentlemen?

Mr. Stimmel: No objection.

Trial Examiner Myers: There being no objection, the card is received in evidence, and I'll ask the reporter to please mark it as Board's Exhibit 5(1).

(Testimony of Elmoth Hostetler.)

(Thereupon the document heretofore marked Board's Exhibit 5(1) for identification was received in evidence.)

BOARD'S EXHIBIT No. 5(1)

No. 21807

E. P. HOSTETLER,
1504 MacArthur Blvd.
Oakland, Calif.

Mach.

Month	Date Paid	1944	Dues	Date Paid	1945	Dues
		Card Issued			Card Issued	
Jan.				1/5/45	5496	\$2.00
Feb.				1/5/45	5496	2.00
Mar. (Judson Pac.)				1/5/45	5496	2.00
Apr.						
May	6/ 2/44	4963	\$12.50			
June	6/15/44	5002	I			
July	7/17/44	5093	2.00			
Aug.	7/17/44	5093	2.00			
Sept.	7/17/44	5093	2.00			
Oct.	10/23/44	5337	2.00			
Nov.	10/23/44	5337	2.00			
Dec.	10/23/44	5337	2.00			

Q. (By Mr. Royster): Do you know Daniel C. Wall?

A. Yes, sir.

Q. Was he ever hired to work for Graham, if you know? A. Yes, sir, I hired him in.

Q. In what capacity did you hire him?

A. Machinist.

Q. When did you hire him? [127]

(Testimony of Elmoth Hostetler.)

A. I hired him the day before they closed as out there, the 24th I guess it would be.

Q. 24th of January, 1945? A. Yes, 1945.

Q. Do you have any independent recollection of whether or not he actually performed work for Graham?

A. No, he was coming in that particular morning.

Trial Examiner Myers: You mean the 25th?

The Witness: The 25th, yes, sir.

Trial Examiner Myers: Did he show up for work?

The Witness: No, the 26th. He was hired in the morning of the 25th and was coming in the 26th.

Q. (By Mr. Royster): Do you know whether or not he belonged to any labor organization?

A. I think he belonged to the C.I.O., I'm sure he did, because he had to get cleared out up there.

Q. Well, you think he belonged to Local 1304?

A. Yes, he had to have a clearance, which he did have when he came in.

Q. Well, did you see any such clearance?

A. Yes.

Trial Examiner Myers: Why bother with this man, he wasn't an employee of Graham?

Mr. Royster: Who wasn't?

Trial Examiner Myers: Wall.

Mr. Royster: Well, it's the contention of the Board that he was, he was hired to work for Graham.

Trial Examiner Myers: He was hired, but he didn't work. [128]

(Testimony of Elmoth Hostetler.)

Mr. Royster: He may never have performed any work, but he was hired.

The Witness: Yes, he was hired.

Mr. Royster: That is the testimony. Now, my last question of the witness, I believe was, did you see any clearance for Local 1304?

A. Yes, he had a clearance.

Q. Permitting Wall to go to work for Graham?

A. Yes.

Q. I'll show you Board's Exhibit No. 7—will you mark this Board's Exhibit No. 7 for identification?

(Thereupon the document above referred to was marked Board's Exhibit 7 for identification.)

Q. I'll show you Board's Exhibit No. 7 for identification and ask you if you have seen that before?

A. Yes, sir, that is his clearance, that is so he could get a job.

Q. Is that the clearance that he exhibited to you?

A. Yes, sir, that is the one he showed to me, also showed through the main office.

Mr. Royster: After the parties have examined that, I wish to offer it in evidence.

Trial Examiner Myers: Any objection, Gentlemen?

Mr. Janigian: No objection.

Mr. Stimmel: No objection.

Trial Examiner Myers: There being no objec-

(Testimony of Elmoth Hostetler.)

tion, the paper is received in evidence, and I'll ask the reporter to please mark it Board's Exhibit 7.

(Thereupon the document above heretofore marked Board's Exhibit 7 for identification was received in evidence.)

BOARD'S EXHIBIT No. 7

Card, dated January 25, 1945, duly issued by the East Bay Union of Machinists to Daniel C. Wall, clearing the individual for employment as helper at Judson-Pacific War Industries.

Mr. Royster: Again I'll have to supply a copy, Mr. Graham.

Trial Examiner Myers: Very well. You mean a duplicate?

Mr. Royster: A duplicate, yes, sir.

Q. (By Mr. Royster): Do you know Willis S. Whatley?

A. Yes, sir.

Q. Was he ever hired to work for Graham?

A. Yes, sir, I hired him.

Q. In what capacity? A. As a machinist.

Q. When did you hire him?

A. On the 25th of January, 1945.

Q. Did he ever perform any work for Graham?

A. No, he was coming in the next morning also.

Q. He was due to come to work?

(Testimony of Elmo Hostetler.)

A. The 26th.

Q. The 26th? A. Yes.

Q. Do you know whether or not he was a member of any labor organization?

A. He was also a member of 1304.

Q. How do you know that?

A. Because that was one of the requirements he had to be, and I saw his clearance slip.

Q. Well, are you testifying that you saw a clearance slip from Local 1304? [130]

A. 1304, yes, sir.

Q. Permitting Whatley to go to work?

A. That is right.

Mr. Royster: Will you mark this as Board's Exhibit 8 for identification?

(Thereupon the document above referred to was marked Board's Exhibit 8 for identification.)

Q. I show you Board's Exhibit 8 for identification, and ask you if you have seen that writing before? A. Yes, sir.

Q. On what occasion?

A. This is Willis H. Whatley hired as machinist.

Q. Where did you see that paper?

A. He brought it out to the yard.

Q. Whatley did?

A. Whatley, yes, sir.

Mr. Royster: I wish to offer that in evidence, Mr. Examiner, that is Board's Exhibit 8, as soon

(Testimony of Elmoth Hostetler.)
as the parties have completed their examination of it.

Trial Examiner Myers: Any objection, gentlemen?

Mr. Stimmel: These clearances seem to run to the Judson-Pacific War Industries and not to the Graham Ship Repair Company.

Mr. Janigian: We'll object to it on that ground.

Mr. Stimmel: The objection is made on that ground.

Trial Examiner Myers: The objection is overruled, and the paper is received in evidence, and I'll ask the reporter to please mark it as Board's Exhibit 8. [131]

(Thereupon the document heretofore marked Board's Exhibit 8 for identification was received in evidence.)

BOARD'S EXHIBIT No. 8

Card, dated January 25, 1945, duly issued by the East Bay Union of Machinists to Willis H. Whatley, clearing the individual for employment as helper at Judson-Pacific War Industries.

Mr. Royster: I'll furnish a duplicate of that in the morning, Mr. Examiner.

Trial Examiner Myers: Very well, sir.

Q. (By Mr. Royster): Do you know Lloyd M. Lee?
A. Yes, sir.

(Testimony of Elmoth Hostetler.)

Q. Was he ever hired to work for Graham?

A. Yes, sir, he was hired to work for Graham.

Q. In what capacity?

A. As a machinist.

Q. When? A. January 25, 1945.

Q. Who hired him? A. I hired him.

Q. Do you know whether or not he was a member of any labor organization?

A. Yes, sir, he was a member of the C. I. O. 1304.

Q. How do you know that?

A. Because he brought his clearance down from the local.

Mr. Royster: Will you mark this as Board's Exhibit 9 for identification?

(Thereupon the document above referred to was marked Board's Exhibit 9 for identification.)

Q. I show you Board's Exhibit 9 for identification. Have you seen that writing before?

A. Yes, sir.

Q. On what occasion? [132]

A. When Lloyd M. Lee brought it in for employment.

Mr. Royster: I offer this in evidence after the parties have had opportunity to examine it.

Mr. Stimmel: Objected to for the same reason, and for the further reason that he never had admission to get into the yard, never reported for work, never did any work for Graham.

Mr. Royster: That is in the nature of testimony, Mr. Examiner.

(Testimony of Elmoth Hostetler.)

Trial Examiner Myers: The objection is overruled. Have you any objection, Mr. Janigian?

Mr. Janigian: No objection.

Trial Examiner Myers: The paper is received in evidence, and I'll ask the reporter to please mark it as Board's Exhibit No. 9.

(Thereupon the document heretofore marked Board's Exhibit 9 for identification was received in evidence.)

BOARD'S EXHIBIT No. 9

Card, dated January 25, 1945, duly issued by the East Bay Union of Machinists to Lloyd M. Lee, clearing the individual for employment as helper at Judson-Pacific War Industries.

Mr. Royster: I will supply a duplicate of that in the morning.

Trial Examiner Myers: Very well.

Q. (By Mr. Royster): Did Mr. Lloyd M. Lee ever perform work for Graham, to your knowledge? A. No, sir.

Q. Mr. Hostetler, is there a sign on the premises of Graham Ship Repair Company, at the entrance?

A. There used to be a Judson sign there. Whether or not they have replaced that, I couldn't say. I know there was a Judson sign there. [133]

(Testimony of Elmoth Hostetler.)

Q. Do you recall any—did you work on January 25, 1945? A. Yes, sir.

Q. Will you tell us what took place in the afternoon of that date?

A. Well, I suppose you have reference to these A. F. L. men coming in and asking me for employment? They said they had been sent down there to go to work. I asked to see their clearances, and they were from the A. F. L. Local. I told them I had no authority whatsoever to hire them, as we weren't hiring anything but C. I. O. members from Local 1304. They told me different, they says, "Well, we're going to be hired today, because we're taking over the yard." I says, "That is news to me, I don't know anything about that." They said, "Well, there is our state representative and national representative standing over there talking to Mr. Lehaney." This gentleman back here was one of them, they called the state representative, and Mr. Ross was supposed to be their national representative, and——

Trial Examiner Myers: You mean of the A. F. L.?

The Witness: Of the A. F. L. Local 264 I believe it is. And I told them I couldn't do anything for them at that particular moment. Our assistant superintendent came by——

Trial Examiner Myers (Interposing): What is his name?

The Witness: Al Rogers. I told Al I had a problem there for him. I said, "What is the score?"

(Testimony of Elmoth Hostetler.)

He said, "Well," he says, "I guess your finished." I says, "What do [134] you mean?" He says, "Well, A. F. L. is taking over, you boys are done."

Trial Examiner Myers: Rogers said that?

The Witness: That is what Rogers told me, and that is the first that I knew of it.

Q. (By Mr. Royster): Well, after getting this advice from Mr. Rogers, what did you do?

A. I immediately notified all the boys what had taken place.

Trial Examiner Myers: What do you mean by "all the boys"?

The Witness: Well, all the machinists, what had taken place, what Mr. Rogers had told me. And I asked one of the boys if they would notify Mr. Smith of what had taken place, and he said he would, and that is about the sum and substance of it.

Trial Examiner Myers: What time of the day was this?

The Witness: This happened to be along about five o'clock in the afternoon.

Q. (By Mr. Royster): Was there any one else present when you had this conversation with Mr. Rogers, other than you and Mr. Rogers?

A. Yes, there were two machinists from the A. F. L. organization that had come in, that I had been talking with, that were going to work.

Trial Examiner Myers: Did they go to work that afternoon?

(Testimony of Elmoth Hostetler.)

The Witness: Yes, they went to work that evening along with another man who was supposed to take over the night job. [135]

Q. (By Mr. Royster): Did you ever know the names of those two A. F. L. applicants?

A. No, I don't think I know their names. I think they told me their names. I happened to know Mr. Ross, because I had worked with him on numbers of jobs and I knew him quite well.

Q. Have you requested reinstatement to your job?

A. Well, only through my business agent, Mr. Smith.

Q. Did you present yourself at the Graham yard on the morning of January 26th?

A. Yes, sir.

Q. For employment? A. Yes, sir, I did.

Q. And will you tell us what, if anything, happened?

A. Well, I went down there merely as a favor to them, they asked me to come down.

Trial Examiner Myers: Who?

The Witness: Mr. Rogers and Mr. Close, due to the fact that they had quite a lot of work in there at that particular time and there was a lot of work that was partly done and just starting to be done, and so on, and so forth, and they didn't know a great deal just what had to be done, that is they knew some, but not all of it. And I went down to kind of straighten them out, stayed down there all morning. Mr. Smith gave me authority to go

(Testimony of Elmoth Hostetler.)

down there and kind of straighten them out on the work, show them what had been done and what hadn't been done and what was in the process of being done. [136]

Q. On these men that you testified to hiring, on the 25th or the 26th, did you see those men on the premises on the 26th when they reported for work, or did they report for work?

A. The 26th, no, I didn't see them on the premises on the 26th, because we notified them the 25th, we got ahold of them before they came to work.

Q. So they never showed up?

A. No, they were never there.

Q. They never were admitted on the premises?

A. Yes, they were admitted on the 25th, they came in and hired in.

Q. You hired them on the premises?

A. That is right, but so far as actual working, they never worked.

Mr. Stimmel: That is all.

Trial Examiner Myers: Mr. Janigian?

Cross Examination

By Mr. Janigian:

Q. Mr. Hostetler, with respect to the last two weeks in December, you said you were working on the premises of the Judson-Pacific Shipyards?

A. Yes, sir.

Q. Which is now occupied by the Graham Ship Repair Company? A. That is right, sir.

Q. Now, all work on vessel construction or repair was stopped about December the 19th?

(Testimony of Elmoth Hostetler.)

A. That is right.

Q. Is that right? A. That is right.

Q. What work were you doing?

A. Maintenance work.

Q. What were you maintaining?

A. Well, there was a number of things around there that had to be kept up, little odd jobs here and there, the cranes, and such as that. We kept up a lot of that stuff.

Q. You were being paid by whom?

A. By Judson-Pacific Company.

Q. Judson-Pacific War Industries?

A. That is right.

Q. And how many other machinists were employed there?

A. I had two others with me at the time.

Q. But the last two weeks you did not work full time, did you?

A. No, I can't say that we worked—I think we were off a few days there, I know I voluntarily took a few days off, because it was around Christmas time.

Q. Isn't it a fact that you took these few days off between Christmas and New Years?

A. I don't remember just when it was. I'm sure it was [138] Christmas, though, was one of the days along about that time, it was either before or afterwards, I could check up easy and find out.

Q. You don't happen to have the stubs.

A. I have some of the stubs, but didn't bring that particular one. In fact, Judson didn't pro-

(Testimony of Elmoth Hostetler.)

duce stubs. I'd have to check it up on something different.

Q. They didn't give you any stubs, though?

A. We didn't have stubs with Judson.

Q. I see. Now, then, you knew that the plant was being sold to the Graham Ship Repair Company, or to Mr. Graham?

A. Truthfully I didn't know it.

Q. You didn't know it? A. That is right.

Q. Now, how did you happen to go to work on January the 3rd, of this year?

A. I was already working, it was my job there. I had never terminated services there, my service was still going on there, so far as I knew.

Q. Why did you go to work on January the 1st?

A. January 1st, well it happened to be that I was off those few days.

Q. Who told you, who paid you off?

A. The superintendent of the yard.

Q. And who was he? A. Mr. Close.

Q. Mr. Close? A. That is right. [139]

Q. He laid you off how many days before January 1st, about?

A. I can't recall the exact number of days.

Q. Several days before, though?

A. Well, it was a few days, I wouldn't say several days, I wasn't off too much.

Q. A few days? A. That is right.

Q. Could it be a week? A. Possibly, yes.

(Testimony of Elmoth Hostetler.)

Q. Did he give you any reason for laying you off?

A. None at all. I could have stayed right on if I'd have wanted to stay on.

Q. But he did lay you off, though?

A. Yes, he asked me if I wanted to take a few days off, and I took it off.

Q. I see. He didn't give you a quit slip?

A. Pardon?

Q. He didn't give you a quit slip?

A. Oh, no, no, no.

Q. Now then, did he tell you when to return?

A. Well, I kept going back to the yards there.

Q. Well, it's a fact, isn't it, that after January the 1st, you reported at the yard to see if there was work?

A. Well, they generally kept in contact with me. They'd call me up if they wanted me to come down, if they had anything to do. That was the agreement between Mr. Close and myself.

Q. Well, what happened on this occasion. You have said a [140] minute ago that you want back to the yard before January the 3rd.

A. Well, I'd go back there occasionally to see what was doing.

Q. You'd drop by? A. That is right.

Q. And did you drop by about the 3rd of January to see what was doing?

A. No, they called us up the 2nd, I think it was, and told us that they were typing up some boats down there and would like to have us come

(Testimony of Elmoth Hostetler.)

in on the 3rd and get ahold of all the men possible and bring them in on the 3rd.

Q. And on the 3rd how many went to work, three?

A. I don't remember just exactly, I think it was about three or four men is all that went to work on the 3rd; I think three men to be exact.

Q. Three, including yourself?

A. Yes, I believe it was three, including myself.

Q. And did you contact these other two or had Mr. Close contacted them?

A. We got ahold of them, we called them up, called around and finally got ahold of them, one or two of the fellows we couldn't get for a couple or three days, but we finally got ahold of them.

Q. When you say "we," do you mean yourself?

A. Mr. Close and myself.

Q. Mr. Close and you?

A. That is right, we kind of cooperated a little bit. [141]

Q. When you went to work on the 3rd, did you see Mr. Graham around the premises?

A. Yes, I met Mr. Graham, I believe, either the 3rd or 4th, I think I met him in the office, I happened to go in the office, and they introduced Mr. Graham to me.

Q. You knew then that you were working for another employer?

A. I really didn't know it at that time, no, sir, I can't say that I did.

Q. Mr. Close didn't—

(Testimony of Elmoth Hostetler.)

A. No, they told me something was going to happen, but they didn't come out and tell me what it was.

Q. I see. Now, when did—at what hour did the day shift terminate its work on January 25th?

A. 7:30 or 7 o'clock, I think it was 7 o'clock.

Q. 7 o'clock? A. Yes, 7 o'clock.

Q. And did the machinists continue to work until 7 o'clock? A. Oh, yes.

Q. Did any one tell them not to return the next morning?

A. Yes, I told them not to come the next morning, because Mr. Rogers told me that we were finished, and then to verify that I went down and had a talk with him, or Mr. Close, oh, just as soon as I found him, that was along about 6 o'clock, after an hour after I talked with Rogers, and Mr. Close told me the same thing.

Q. Well, isn't it a fact that on that afternoon Mr. Smith came to the plant and had a meeting with the men? [142]

A. Well, he told me after these two fellows had told me, these two fellows had told me first that we were through, and then Mr. Smith also told us afterwards when he came down there.

Q. You say at the time Mr. Rogers said that you were through, did he say that you were discharged and fired?

A. Well, he didn't say we were fired, he said we were finished. I took it for granted that we didn't have any job any more.

(Testimony of Elmoth Hostetler.)

Q. Well, he said—I'll ask to strike what the witness thought on the matter.

Trial Examiner Myers: Motion denied.

Q. (By Mr. Janigian): He did tell you that A. F. L. machinists were coming in?

A. He said definitely they were in, they weren't coming in, they were in, they were taking our places, that's the exact words he said, "They're taking your places."

Q. Mr. Rogers said that?

A. That is right.

Q. Now, were you present at the time there was a meeting at the yard of the machinists on the afternoon of the 25th, when Mr. Smith was there?

A. Well, that was late in the afternoon, yes, I was there at that time.

Q. You were there? A. Yes.

Q. And what did Mr. Smith tell these men?

A. Well, so far as I remember, he told us just about what I have told you, that 284, or the A. F. L. were coming in, [143] and they were out.

Q. Did you protest to Mr. Rogers about the action that was being taken?

A. Well, I didn't have much protest coming.

Q. Isn't it a fact, Mr. Hostetler, that at that meeting of the machinists, at the plant with Mr. Smith present, it was decided to strike the job?

A. Oh, definitely not. We were notified and told before Mr. Smith had anything to say about it, we were told by Mr. Rogers that we were out of a job, we had no job, and then Mr. Close told me

(Testimony of Elmoth Hostetler.)

the same words, he verified Rogers, what Rogers had told me not over an hour before that, and then Smith told us after these two men had told us we were out of a job.

Q. Now, were you present when Mr. Smith served an ultimatum on Mr. Graham, that unless the A. F. L. machinists were out of the plant and the contract was signed with 1304, that there would be a picket line on the 26th?

A. No, sir, I never heard anything like that.

Q. You never heard that? A. No, sir.

Q. Now, you returned to the plant the next morning, didn't you? A. That is right.

Q. At whose request?

A. Mr. Close and Mr. Rogers, and I had permission from Mr. Smith to go back.

Q. Now, why did you have to get permission from Mr. Smith [144] to go back to the plant?

A. Well, I thought that I just wanted to keep my nose clean. I didn't want to stick my neck out, because after all I figured I was doing something a service and a good service by going down there and kind of straightening the boys out. I didn't ask them to go down, they asked me to come down. I didn't ask them to compensate me in any way. I just figured I was doing them a justice.

Q. What did you ask Mr. Smith about going down to the plant?

A. I asked him if it would be all right for me to go down and straighten the boys out, and he

(Testimony of Elmoth Hostetler.)

agreed with me, so naturally that was the only thing for me to do.

Q. You asked him for permission to go down, because you knew that as a member of 1304 you weren't supposed to go down and work under those conditions?

A. They already told me I didn't have a job down there.

Q. Well, I'm asking you——

Trial Examiner Myers: Don't argue with the witness, Mr. Janigian.

The Witness: If somebody tells me I'm out of a job——

Trial Examiner Myers (Interposing): Never mind, Mr. Witness.

Q. (By Mr. Janigian): Did you get this permission from Mr. Smith in writing or orally?

A. No, I just asked him, and he told me it would be O. K. to go down.

Q. When you went down, did you ask Mr. Close whether you [145] could have your job back?

A. No, I didn't.

Q. Did you at any time subsequently ask Mr. Close or Mr. Graham if you could have your job back?

A. No, I never had a chance to talk with them at all. I talked with Mr. Close, but I didn't think there was any use talking as long as conditions were as they were.

Q. As a matter of fact, Mr. Hostetler, you wouldn't have gone back to work and worked with A. F. L. machinists, would you?

(Testimony of Elmoth Hostetler.)

A. That is right, I wouldn't.

Q. And that is also true of the other members of 1304?

A. I can't speak for them, but I surely can speak for myself.

Q. And isn't it also a fact that you were instructed by Mr. Smith that you were not to go back unless 1304, unless and until 1304 had a contract with the Graham Ship Repair Yard?

A. I couldn't very well go back unless we had a contract to go back in there.

Mr. Sapiro: He asked you whether Mr. Smith told you that?

The Witness: No, no, Mr. Smith never told me that.

Q. (By Mr. Janigian): But you and the other men knew that you couldn't go back until you did have a contract?

Mr. Royster: I'll object to that.

Trial Examiner Myers: I'll sustain the objection.

Q. (By Mr. Janigian): Was there any discussion as to whether or not you were to go back unless 1304 had a contract? [146]

Mr. Royster: I object unless he specifies the time, the place, and who was present.

Trial Examiner Myers: Well, if the witness says no, that is the end of it. Overruled. What is the answer?

The Witness: No, I never talked to anybody.

JAMES E. POTTER,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined, and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Potter, James E.

Trial Examiner Myers: Will you spell your last name for the record, please?

The Witness: P-o-t-t-e-r.

Trial Examiner Myers: Where do you live, Mr. Potter?

The Witness: Live at Box 84, Moraga Valley.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Royster.

Q. (By Mr. Royster): What is your employment, Mr. Potter? A. Machinist.

Q. And where are you employed? [147]

A. Hurley Marine.

Q. How long have you been employed by Hurley?

A. Oh, about a month, I guess, three weeks or a month.

Q. Did your employment there start some time in February? A. Yes.

Q. Were you ever employed by the Graham Ship Building or Ship Repair Company?

A. Yes.

Q. When was your employment there?

A. When did it start?

(Testimony of James E. Potter.)

Q. Yes. A. Oh, about January 26th.

Trial Examiner Myers: When?

The Witness: June 26th.

Trial Examiner Myers: What year?

The Witness: '44. That is Judson.

Q. (By Mr. Royster): Judson-Pacific War Industries?

A. Yes.

Q. How long did your employment with Judson continue there?

A. Well, it never stopped, it went right on until Mr. Graham took it over, and I was never unemployed.

Q. Well, take now the last week in December, 1944, did you perform any work for Judson-Pacific that week? A. The last week in December——

Trial Examiner Myers: Why don't you get the payroll records and show when these people were working there, and I guess Counsel will stipulate that the records are correct.

Mr. Royster: I don't have any payroll records for Judson. [148]

The Witness: I don't just remember.

Q. (By Mr. Royster): Were you ever discharged by Judson? A. No.

Q. Were you laid off occasionally?

A. I believe we were laid off around—due to a lack of work, around Christmas.

Q. Around Christmas time? A. Yes.

Q. Were you told when to report back to work?

A. Yes, we were told—Mr. Hostetler informed

(Testimony of James E. Potter.)

me there was more work in the yard and we could come back. I think we were out about ten days or so.

Q. I see. Did you return to work then around the 3rd of January? A. Yes.

Mr. Janigian: Well, I'm going to object to—excuse me, I'm going to object to the last question on the grounds it's leading and suggestive.

Trial Examiner Myers: I'll sustain the objection. When did you start to work in 1945?

The Witness: You mean after the layoff?

Trial Examiner Myers: The first day this year, when you started to work at this yard?

The Witness: Let me see—

Mr. Royster: Mr. Examiner, Board's Exhibit 7, I believe it is, which went into evidence, shows the name of Potter.

Trial Examiner Myers: Why did you ask the question then. Does it show when they started to work, or those are the days they were working?

Mr. Royster: Shows he was on the payroll on the 5th day of January. I was thinking it was the 3rd.

Trial Examiner Myers: Well, did he start on the 5th or the 2nd, 3rd, or 4th?

Mr. Royster: Well, apparently the witness' recollection doesn't extend to that. The Exhibit shows him to be working on the 3rd.

Trial Examiner Myers: Go ahead.

Q. (By Mr. Royster): Are you a member of any labor organization?

(Testimony of James E. Potter.)

A. No, that is, the C. I. O. 1304.

Q. And how long have you been a member of Local 1304?

A. Oh, probably seven months, six or seven months.

Q. Were you a member in good standing of Local 1304 during the entire month of January, 1945?

A. Yes.

Q. When did you leave your employment at Graham?

A. On the evening of the 25th.

Q. Of what month?

A. That was in January.

Q. Of this year?

A. Yes.

Q. Will you tell us the circumstances under which your employment ended?

A. Well, we came in, we were out on the ship and came in the office, that is in our tool room, and we were notified that the A. F. L. had come in to take possession of the yard.

Q. And about what time of day was this? [150]

A. What is that?

Q. What time of day was this?

A. We were notified, I believe, about 5 o'clock.

Q. Who notified you?

A. Mr. Hostetler.

Q. Did you have any conversation with Mr. Rogers that evening?

A. No, I never knew the gentleman.

Q. Or Mr. Close?

A. I knew Mr. Close.

Q. Did you have any conversation with him that evening?

(Testimony of James E. Potter.)

A. Oh, just no more than to ask him what the score was, he said he didn't know just what the score was.

Q. Did Mr. Hostetler—what was your testimony as to what Mr. Hostetler told you?

A. He said that the A. F. L. was in, and he says, "I guess we are not, we are through."

Q. Did you work a full day on January 25th?

A. Yes.

Q. Did you report for work the next morning?

A. No, we did not.

Q. Have you been back to Graham Ship since January 25th?

A. Only to drop in occasionally, say hello to some——

Q. I didn't hear.

A. Only to drop in and say hello to Jimmy Close and a few others as I went by, that is all.

Trial Examiner Myers: Were you paid off on the 25th?

The Witness: No. [151]

Trial Examiner Myers: When were you paid off?

The Witness: Oh, I think it was—I believe it was a couple of weeks after that, about ten days, I guess.

Trial Examiner Myers: Did you go to the plant for your money?

The Witness: Went down to the plant, yes.

Q. (By Mr. Royster): Have you made any request to be reinstated to your position at Graham's?

(Testimony of James E. Potter.)

A. No, I never did.

Q. I'll show you Board's Exhibit 5(h) for identification, and ask you if you can identify that card?

A. Yes. Do you want me to read this?

Q. Well, just tell us what it is?

A. Well, it's a—keeping track of—they've got the dues down here when they were paid, and the month they were paid in.

Q. Does that accurately represent the dues that you paid Local 1304?

A. That represents the dues I've paid 1304, yes, sir.

Mr. Royster: I'll offer Board's Exhibit 5(h) in evidence.

Trial Examiner Myers: Any objection, Gentlemen?

Mr. Stimmel: No objection.

Mr. Janigian: No objection.

Trial Examiner Myers: There being no objection, the card is received in evidence, and I'll ask the reporter to please mark it as Board's Exhibit 5(h).

(Thereupon the document heretofore marked Board's Exhibit 5(h) for identification was received in evidence.) [152]

(Testimony of James E. Potter.)

BOARD'S EXHIBIT No. 5(h)

No. 21928

JAMES E. POTTER,
Box 84
Moraga, Calif.

Mach.

		1944		1945		
Month	Date Paid	Card Issued	Dues	Date Paid	Card Issued	Dues
Jan.				1/5/45	5496	\$2.00
Feb.				1/5/45	5496	2.00
Mar.				1/5/45	5496	2.00
Apr.	(Judson)					
May						
June	6/23/44	5022	\$12.50			
July	7/17/44	5098	I			
Aug.	7/17/44	5098	2.00			
Sept.	7/17/44	5093	2.00			
Oct.	10/23/44	5337	2.00			
Nov.	10/23/44	5337	2.00			
Dec.	10/23/44	5337	2.00			

ELGA O. ASHCRAFT,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined, and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Elga O. Ashcraft.

Trial Examiner Myers: Will you spell your entire name?

The Witness: E-l-g-a O. A-s-h-c-r-a-f-t.

(Testimony of Elga O. Ashcraft.)

Trial Examiner Myers: Where do you live, Mr. Ashcraft?

The Witness: 16771 Melody Way, San Leandro.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Royster.

Q. (By Mr. Royster): What is your employment, Mr. Ashcraft?

A. Machinist.

Q. And where are you employed? [153]

A. Hurley Marine.

Q. How long have you been working there?

A. I went to work for them the 8th of February, '45.

Q. Were you ever employed by Judson——

Trial Examiner Myers: 8th of what, February?

The Witness: Yes.

Q. (By Mr. Royster): Were you ever employed by Judson-Pacific War Industries?

A. Yes.

Q. When did you begin your employment there?

A. I believe it was June the 30th, 1944.

Q. Were you employed there in December of last year? A. Yes, sir.

Q. What was your classification when you worked for Judson?

A. I had charge of the machine shop.

Q. What was your payroll classification, do you recall?

A. Well, it was the repair scale, dollar thirty-four.

Q. As a machinist? A. Yes.

(Testimony of Elga O. Ashcraft.)

Q. Now, in the last week of December, 1944, did you perform any work at Judson-Pacific's Yard? A. The last week, no, sir.

Q. Were you—how does it happen that you performed no work in that last week?

A. Well, there wasn't any work from about—I don't remember the exact date, but it was just a few days before Christmas until I went back, the 3rd of January.

Q. Well now, how did you come to go back to work on the 3rd [154] day of January?

A. I happened to be in Oakland, and I dropped down to the yard on the 2nd, and they told me to report for work the 3rd.

Q. Who told you?

A. The yard superintendent.

Q. Is that Mr. Close?

A. That was Mr. Close's assistant.

Q. Mr. Rogers?

A. Nick Carlson, I believe, is his name.

Q. Now, during your employment with Judson-Pacific War Industries, did you have a clock number? A. Yes, sir.

Q. Did you have a badge? A. Yes, sir.

Q. Did your clock number change in any respect after January 1st, 1945? A. It did not.

Q. Did your badge number change in any way?

A. No, sir.

Q. After January 1st, 1945? A. No, sir.

Q. Have you ever worked for W. C. Graham, respondent in this case? A. No, sir.

(Testimony of Elga O. Ashcraft.)

Q. Have you ever worked for Graham Ship Repair Company?

A. Well, from January the 3rd until the night of January the 25th. [155]

Q. When you went to work on January the 3rd, did any one say anything to you with respect to a change in management or ownership?

A. I didn't know it for about three days.

Q. Are you a member of any labor organization?

A. C. I. O. Local 1304.

Q. And how long have you been such a member?

A. I don't recall just the exact date that I went into it, but——

Q. Were you a member of Local 1304 on January 1, 1945? A. Yes, sir.

Q. Were you a member in good standing on January 25, 1945? A. Yes, sir.

Trial Examiner Myers: Were you a member in good standing throughout the month of January, 1945?

The Witness: Yes, sir.

Q. (Mr. Royster) Did you work the day of January 25, 1945? A. Yes, until 7 o'clock.

Q. And will you tell us what happened in the afternoon of that day?

A. Well, Mr. Hostetler came down about, oh, I imagine it was some place between five and six, and said that he had just been told that we was out of a job, that the A. F. L. was coming in at seven o'clock, so that is about all that was said.

(Testimony of Elga O. Ashcraft.)

Q. Did you talk to Mr. Close that evening?

A. I never, no, sir. [156]

Q. Did you—were you present when Mr. Close was in conversation with any one with respect to the A. F. L. coming in? A. No, sir.

Q. Did you hear any conversation in which Mr. Rogers was engaged with respect to that?

A. No, sir.

Q. Did you report for work on the morning of January 26th? A. No, sir.

Q. Have you been back to the Graham Ship Repair Company to seek reinstatement?

A. No, sir.

Q. To your job? A. No, sir.

Mr. Royster: That is all.

Mr. Stimmel: No questions.

Trial Examiner Myers: Any questions, Mr. Janigian?

Cross Examination

Q. (By Mr. Janigian) Did any one tell you, Mr. Ashcraft, on January 25th that you were not to return to work the next morning, any one connected with the Graham Ship Repair Company?

A. Well, just Mr. Hostetler, he was out too.

Q. But Mr. Hostetler was one of the machinists. A. That is right.

Q. Did Mr. Close or—

A. I never talked to Mr. Close.

Q. Or Mr. Rogers, any—did any of the bosses tell you [157] not to come back to work the next day? A. Well, Mr. Hostetler was my boss.

(Testimony of Elga O. Ashcraft.)

Q. What was his position?

A. He was acting foreman.

Q. Was he an acting foreman at that time, or just a leaderman? A. Foreman.

Q. Foreman? A. Yes.

Q. And did he tell you not to come back the next day? A. Yes.

Q. By the way, were you present at a meeting that was called by Mr. Smith of the union at the plant of the Graham Ship Repair Company that afternoon, on January 25th?

A. I was.

Q. What was said at that meeting, do you know?

A. Well, just said that the A. F. L. was coming in at 7 o'clock, and looked like we was through.

Q. Well, the A. F. L. men, who were coming in at 7 o'clock, were coming in to take over the night shift, isn't that right?

A. Well, probably take it all over.

Q. Well, just answer the question. They were going over to take the night shift; that is right, isn't it?

Mr. Sapiro: I object to that as calling for a conclusion of the witness. If there is any conversation, Mr. Examiner, that is something.

Trial Examiner Myers: Overruled. Read the question to the witness. [158]

(The question referred to was read by the reporter.)

The Witness: That is not the way it was put

(Testimony of Elga O. Ashcraft.)

to me. They was going to take over, we was out of a job.

Q. (By Mr. Janigian) Who said that?

A. Well, that is what Mr. Hostetler said that Mr. Rogers said.

Q. Well, what did Mr. Smith say about this at that meeting?

Mr. Royster: I think I'll object to that. I don't believe that is pertinent here.

Trial Examiner Myers: Overruled.

Mr. Royster: Mr. Smith is a representative of these employees as business agent, and whatever advices may pass between them doesn't seem to me is the subject of inquiry here.

Trial Examiner Myers: Overruled.

The Witness: As near as I remember, he just said that we was out, that we never reported in the 26th.

Q. (By Mr. Janigian): How long did this meeting take?

A. Oh, I imagine we talked for twenty minutes to a half hour.

Q. And what part of that time was taken up by Mr. Smith?

A. Oh, I'd say five or ten minutes.

Q. And in that five or ten minutes he made just that one statement, Mr. Ashcraft?

A. Well, that is all I remember of it. There was quite a bit of confusion there. We didn't know which leg we was standing on.

(Testimony of Elga O. Ashcraft.)

Q. Did he say anything about putting a picket line out there the next day? [159] A. No, sir.

Q. You're sure about that? A. Positive.

Q. Did he say anything about as to whether or not you should work with A. F. L. machinists?

A. I don't recall just exactly what was said in regards to that.

Q. You have no recollection? A. No.

Q. Was the question of getting a contract with Graham Ship Repair Company taken up at that meeting?

A. Well, I don't remember that either.

Q. You have no recollection? A. No.

Q. The only thing you remember was that you were told you were out? A. That is right.

Q. What work are you doing now?

A. Machinist.

Q. At Hurley?

A. Hurley Marine, yes, sir.

Q. Hurley Marine? A. Yes, sir.

Q. Getting the same pay that you were getting at Graham? A. Yes, sir.

Q. Are you a journeyman machinist?

A. Well, I've been at it sixteen years.

Q. Well, I asked you if you were a journeyman machinist, [160] classified as such?

A. Yes.

Q. And you're still classified as a journeyman?

A. Yes.

Mr. Royster: We are, sir. I have a stipulation to propose, Mr. Examiner. It's hereby stipulated

among the parties in this proceeding, that Frank Shaffer, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, C. B. Lewis, and Albert B. Sequeira were members in good standing of East Bay Union of [161] Machinists Local 1304 C. I. O. during the month of January, 1945, and that all production employees employed by Graham Ship Repair Company at its Oakland plant in classifications other than machinists, machinist helpers, machinist apprentices, and machinist trainees from January 2 to January 25, 1945, were cleared through and were members of the respective A. F. L. unions affiliated with the Bay Cities Metal Trades Council.

Trial Examiner Myers: Do you so stipulate, Mr. Royster?

Mr. Royster: I so stipulate.

Trial Examiner Myers: Mr. Stimmel?

Mr. Stimmel: We so stipulate.

Mr. Janigian: I'll so stipulate with just two corrections on my own, production and maintenance employees and to and including January 2nd—I mean January 2nd.

Trial Examiner Myers: Off the record.

(Discussion off the record)

Trial Examiner Myers: On the record now. What about the stipulation?

Mr. Royster: It developed during an off the record conference, Mr. Examiner, that it would be desirable to augment this stipulation, and it will require the company to furnish certain further information. The Board is in the position of being

able to rest at this point with the understanding that a further stipulation may be placed in the record tomorrow.

Trial Examiner Myers: Very well. Are you ready to proceed with your case, Mr. Stimmel?

Mr. Stimmel: Yes. [162]

Mr. Janigian: Excuse me, I don't like to cut your examination short, but I'm willing to stipulate that the machinist requires considerable skill and training, and [163] that the trade of a machinist is a skilled trade. Does that help?

Mr. Royster: Yes.

Mr. Sapiro: Are you willing to stipulate that the machinists are an appropriate bargaining unit, separate and apart from the whole plant?

Mr. Janigian: You mean in this case?

Trial Examiner Myers: He means could they be considered an appropriate unit.

Mr. Janigian: Under certain circumstances they could be, I presume, but we're denying that in this case the machinists are appropriate, we say that the over all unit, the collection of crafts constitutes the appropriate unit.

Mr. Royster: May I propose this stipulation then, Mr. Janigian: That the machinist employees of the respondent here are—during the month of January, 1945, were skilled machinists and possessed the attributes of employment usually associated with the designation of machinist?

Mr. Janigian: Yes, I'll so stipulate.

Trial Examiner Myers: Do you so stipulate, Mr. Royster?

(Testimony of Warren C. Graham.)

Mr. Royster: I so stipulate.

Trial Examiner Myers: Do you so stipulate, Mr. Stimmel?

Mr. Stimmel: Yes.

Q. (By Mr. Royster) Now, Mr. Hostetler, were machinists working under your direction transferred to other work in the ship repair yard from time to time? [164]

A. I don't quite understand.

Q. Were machinists required or requested to do anything but machinists' work?

A. Absolutely nothing but machinists' work.

Q. Were other tradesmen called in on occasion to help do machinists' work? A. No, sir.

Mr. Royster: That is all. [165]

WARREN C. GRAHAM

a witness recalled by and on behalf of the Repondent, having been previously sworn, was examined, and testified further as follows:

Direct Examination

Trial Examiner Myers: You may be seated, Mr. Graham.

Q. (By Mr. Stimmel) Mr. Graham, did you at any time sign a contract with the C. I. O. Union?

A. No, sir.

Q. Did you at any time see a contract signed

(Testimony of Warren C. Graham.)

by the C. I. O. Union and the Graham Ship Repair Company? A. No.

Q. By an agent of your company? A. No.

Q. I believe you testified earlier in the case that you saw some agreement in Mr. Janigian's office; do you recall that agreement? A. That was—

Q. I show you this paper which is purported to be the agreement referred to.

A. Yes, I saw this two days ago.

Q. Would you read that to the Court please?

Mr. Sapiro: Let us see it, will you please, before you have him read it?

Mr. Stimmel: Oh, pardon me.

Mr. Sapiro: We object to that reading into the record, [166] If he wanted to introduce the document, it should be introduced.

Trial Examiner Myers: Why don't you offer it in evidence and substitute a copy?

Mr. Stimmel: I offer it in evidence.

Trial Examiner Myers: Any objection?

Mr. Sapiro: I object to it on the ground that it refers to an attached agreement, it's an incomplete document.

Trial Examiner Myers: That is what the witness saw in Mr. Janigian's office, and that is all he was asked to testify to. The objection is overruled. And I'll receive the paper in evidence and ask the reporter to please mark it as Respondent's Exhibit 1.

(Thereupon the document above referred to was received in evidence, and marked Respondent's Exhibit 1)

(Testimony of Warren C. Graham.)

RESPONDENT'S EXHIBIT No. 1

Bay Cities Metal Trades Council

Main Office

Labor Temple, 2940-16th Street

Telephone UNDERhill 3055 and MARKET 1225

San Francisco 3, California

ACCEPTANCE OF AGREEMENT

It Is Mutually Agreed To, by and between the Employer signatory hereto, engaged in Ship Repair work in the San Francisco Bay Area and the Bay Cities Metal Trade Council of the American Federation of Labor and its affiliated unions, that the Bay Cities Metal Trades Council Ship Repair Agreement attached hereto, shall remain in force and effect in accordance with the terms contained herein.

Dated this 2nd day of January, 1945.

GRAHAM SHIP REPAIR
COMPANY

By /s/ RAYMOND LEHANEY

BAY CITIES METAL TRADES
COUNCIL

By /s/ A. T. WYNN

Secretary

By /s/ THOMAS A. ROTELL

Asst. Sec.

(Testimony of Warren C. Graham.)

Mr. Sapiro: May I make the further objection on that the time in question, the purported date thereof, there was not a single machinist employed in the plant, or in fact there weren't any employed.

Trial Examiner Myers: I'm not passing upon the validity of the contract. The witness is asked if this is the paper that he saw in Mr. Janigian's office two days ago.

Q. (By Mr. Stimmel) Mr. Graham, did you at any time see the instrument to which this document refers?

A. No, sir.

Trial Examiner Myers: Whose signature is that under [167] Graham Ship Repair Company?

The Witness: Raymond Lehaney.

Q. (Mr. Stimmel) Mr. Graham, did you at any time authorize Mr. Lehaney to sign that document, or sign a similar document?

A. Yes, I authorized him to sign an agreement with the Bay City Metal Trades Council, and also authorized Mr. Close to sign one with Mr.—with 1304.

Q. Mr. Graham, did Mr. Lehaney at any time tell you that that contract was signed as of the date which the instrument bears?

Mr. Sapiro: Object to it as hearsay?

Trial Examiner Myers: Overruled.

The Witness: No, he did not.

Q. (Mr. Stimmel) At this conference with Mr. Johnson, Mr. Lehaney, Mr. Smith, and others, on January the 12th——

A. (Interposing) 16th or 17th.

(Testimony of Warren C. Graham.)

Q. 16th, did Mr. Smith ever show to you or display to you a contract with the C. I. O. Union, which he asked you to sign?

A. I did not see one then.

Q. Did he offer one to you?

A. Not to my knowledge.

Q. Up to that date and time you knew of the existence of no contract with the C. I. O. Union?

A. No, sir.

Q. Did you at any time on January the 25th, 1945, or at any time thereafter notify any of your employees that their [168] employment terminated?

A. Personally, no, sir.

Q. Did you instruct Mr. Lehaney or Mr.—or your shop superintendent, hull superintendent, to advise any employees that their employment was terminated because of any union affiliations?

A. No, that matter was handled entirely by Lehaney.

Mr. Stimmel: That is all.

Trial Examiner Myers: Any questions, Mr. Janigian?

Cross Examination

Q. (By Mr. Janigian) How many production and maintenance employees did you work on January 2nd, Mr. Graham?

A. Eighteen, I think, nineteen or eighteen, I don't know which figure is correct.

Q. Could you ascertain those correct figures?

A. Yes.

Q. And will you also ascertain the number, the

(Testimony of Warren C. Graham.)

total number of production maintenance employees including machinists who were working on the 13th, 14 and 15th of January?

A. 13th, 14th and 15th?

Q. Of January.

A. What other date?

Q. January 13th, 14th and 15th.

A. Those are the only three dates?

A. Yes. A. And the 2nd?

Q. And the 2nd, yes. A. Yes. [169]

Q. Now, you can have that information in the morning, Mr. Graham? A. Yes.

Q. By the way, was there a manpower ceiling established for your plant at the time you commenced operation? A. There was.

Q. That man power ceiling was what?

A. 250 men, a temporary ceiling of 250.

Mr. Janigian: That is all.

Trial Examiner Myers: Any questions, Mr. Royster?

Cross Examination

Q. (By Mr. Royster) I want to ask a question or two about this Respondent's Exhibit 1. Did you witness any of the signatures affixed to this, Mr. Graham? A. Did I witness them?

Q. Did you see any of the signatures made on here? A. No, sir.

Q. Do you know what date the signatures were affixed to this? A. No, sir, I do not.

Q. Do you recall correctly that your testimony

(Testimony of Warren C. Graham.)

is that you have not seen the agreement to which this document refers? A. That is correct.

Trial Examiner Myers: And you say you only saw this Respondent's Exhibit 1 a few days ago?

The Witness: Day before yesterday.

Trial Examiner Myers: For the first time?

The Witness: Yes. [170]

Trial Examiner Myers: That was for the first time?

The Witness: That is correct.

Cross Examination

Q. (By Mr. Sapiro) Now, at this conference that you were asked about by your Counsel, did Mr. Lehaney tell anybody there, or tell Mr. Smith, that he had signed a contract with the A. F. L. covering machinists prior to that time?

A. Yes, Lehaney stated that he had signed a contract with the A. F. L., and that we were endeavoring to persuade the A. F. L. to permit the C. I. O. machinists to work in the yard.

Q. And was any contract exhibited at that time?

A. No, sir.

Q. Well, did you make any inquiry as to the contract at that time? A. No, sir.

Q. Did you ever ask Lehaney, either prior to that time or prior to January the 25th, about the terms of the contract? A. No, sir, I did not.

Q. Well, weren't you interested in it?

A. I wanted it presented to me, but after that

(Testimony of Warren C. Graham.)

Lehaney had left, and I didn't get an opportunity to so ask him.

Trial Examiner Myers: Left where?

The Witness: Left our employ. [171]

Trial Examiner Myers: When was that?

The Witness: At the beginning of February.

Trial Examiner Myers: This year?

The Witness: Yes, sir.

Q. (By Mr. Sapiro) Now, on January 25th and 26th did you have any conversation with Lehaney about the hiring of A. F. L. machinists?

A. Yes.

Q. Did he tell you that he had signed a contract for A. F. L. machinists?

A. Yes, he had, said he had, and that—he didn't mention machinists specifically, but he stated that the A. F. L. wanted all of the employees in the yard to be affiliated with the Bay Cities Metal Trades Council.

Q. And——

A. (Interposing) And stated that he had an agreement with them not to disturb the yard until after we had finished this important work which we were doing, which occurred around the 25th or 26th of the month.

Q. Well, did you ask him why the A. F. L. machinists were coming in that day?

A. He had said that they insisted on a complete closed shop agreement and would permit no yard to operate in the bay area unless it was such an agreement.

(Testimony of Warren C. Graham.)

Q. Well, did you discuss with him the reason why C. I. O. machinists had been working there since January the 2nd?

A. Yes, he understood that.

Q. Pardon me, what did he say and what did you say about that? [172]

A. We both discussed the working of the C.I.O. machinists, stating that they were the same type of craft that were working in the other principal yards, and unless we had those C.I.O. machinists, why it would seriously affect our business, because we couldn't send our ships to other yards or into dry dock, which we do not have any, because the other C.I.O. machinists in the other dry docks wouldn't work our ships.

Q. When was that discussion, on what day?

A. Oh, we discussed that around the time of this—that discussion started around the 10th, somewhere around the 10th of January, continued on through until the latter part of February.

Q. Was there any discussion of that at the meeting on January the 17th?

A. Yes, we were endeavoring to——

Q. Well, tell us what—I want to know what you said?

A. Mr. Lehaney and Mr. Smith were going at each other fairly hot, and we told Mr. Smith that we were endeavoring to get permission of the A.F.L. to permit C.I.O. machinists to work in the yard. Mr. Smith stated, and we asked him for any help or assistance that he might have or know of

(Testimony of Warren C. Graham.)

which would further that argument, Mr. Smith stated that he had a ruling of the Court which would further the argument, and to present our case to the A.F.L., and Mr. Lehaney asked him to produce it. He said he would. That was—this meeting was in the morning, and I think the time that Mr. Smith said he would produce it was around 11 o'clock. I insisted that Lehaney get it as soon as he could, to go up to the headquarters of the Bay City Metal Trades Council. I talked to Mr. Lehaney and later called him on the phone and asked him had he—did he have this document, and he said no. he had called Mr. Smith and Mr. Smith had said that he was typing it. Then I called him again and asked him if he got the agreement, and Mr. Lehaney said no. Mr. Smith had then told him he had to get it from his lawyer, and then about in the afternoon at 1 or 2 o'clock, why Mr. Lehaney went up to the Bay City Metal Trades without it.

Q. Well, that discussion was concerning a case known as the Pacific Box Company case, was it not?

A. We did not mention any names there.

Q. Did Mr. Smith say that under the authorities, as he understood them, that the contract carried over, wasn't that the subject of the conversation?

A. No, he didn't state specifically what it was, but they stated that this would be evidence for us to present to the Bay City Metal Trades Council, to get them to permit the C.I.O. machinists to work in the yard.

Q. Well, you were not willing, or didn't you so

(Testimony of Warren C. Graham.)

state at that time that you couldn't sign a contract, because Lehaney had already signed one with the A.F.L.?

A. No. I heard Lehaney tell the Bay City Metal Trades Council that we had signed a contract with the C.I.O.

Q. When did Lehaney say that to——

A. (Interposing): Around the 13th. And he insisted that [174] Jim Close get in touch with Mr. Smith and have him sign the contract, so he could produce it, and I think—and then at that time requested Jim to date it before the 15th, and we could not or did not produce a contract on the 15th, so Lehaney told them that he didn't have the contract.

Trial Examiner Myers: Told who?

The Witness: Told Bay City Metal Trades Council.

Trial Examiner Myers: That you did not have——

The Witness: That we did not have a C.I.O. contract, then they insisted that the entire yard be A.F.L.

Trial Examiner Myers: What did you do then?

The Witness: We continued a series of negotiations with the Bay City Metal Trades Council, several meetings, which we endeavored to have the Bay City Metal Trades Council permit us to use the C.I.O. machinists, but after several meetings they decided that they wouldn't permit us to do so.

Trial Examiner Myers: When did they notify you then?

(Testimony of Warren C. Graham.)

The Witness: Around the beginning of February.

Trial Examiner Myers: Of this year?

The Witness: Yes.

Trial Examiner Myers: After the 25th?

The Witness: That is right.

Trial Examiner Myers: What did you do then?

The Witness: I consulted——

Trial Examiner Myers: I mean regarding the C.I.O.?

The Witness: Then I told Mr. Smith that I had decided that the appropriate action to take was through the [175] legal authorities of the government, and that would be my answer.

Trial Examiner Myers: And about when was that, that you told that to Smith?

The Witness: It was somewhere around the beginning of February.

Q. (By Mr. Sapiro): At that conversation that you now refer to, Mr. Smith demanded or requested, put it that way, that the C.I.O. machinists be reinstated and put back to work?

A. At that time, yes; he didn't demand, he requested, he stated that he could not only furnish us with C.I.O. machinists, but if need be the remaining of the crafts; in other words, he was endeavoring to make up our minds together as to our final action.

Q. And at that time you hadn't seen the so-called contract?

A. That is right, I hadn't seen any contracts.

(Testimony of Warren C. Graham.)

Q. Now, was there more than one contract signed with the A.F.L. that you know of?

A. No, sir, the only contract that I have heard about is this one, which I saw.

Q. The document, Respondent's Exhibit No. 1, which you just pointed at, is that the only document that was shown to you in Mr. Janigian's office?

A. That is the only labor agreement I've seen.

Q. Neither you nor your counsel have in your possession any other contract or contracts?

A. None whatever.

Q. Now, on the meeting of the 17th, as you say Mr. Lehaney [176] state to Mr. Smith that he had signed a contract; that was the first you had ever heard of it?

A. That was the first I had ever heard of it.

Q. So that you knew on that date that you were obligated to the A.F.L. without knowing the terms of the contract?

A. Yes, I did then, yes.

Q. That was the first time you ever heard of it?

A. That is right.

Q. And would you have signed a contract with Mr. Smith that day after what Lehaney had told you?

A. At that particular date?

Q. Right then and there.

A. That I don't know.

Mr. Sapiro: I think that is all.

Trial Examiner Myers: Any redirect, Mr. Stimmel?

Mr. Stimmel: No questions.

Trial Examiner Myers: Mr. Janigian, any questions?

(Testimony of Warren C. Graham.)

Recross Examination

Q. (By Mr. Janigian): Mr. Graham, after you gave Mr. Lehany authority on January 2nd to enter into an agreement with the Bay Cities Metal Trades Council, you didn't revoke that authority, did you?

A. No, sir.

Mr. Janigian: That is all.

Mr. Royster: That is all.

Trial Examiner Myers: You're excused, sir.
Thank you.

Recross Examination

Q. (By Mr. Sapiro): Pardon me, just one question. On January the 17th, if that be the date of the conversation—— [177] A. Yes.

Q. Did you know that at that time all of the men who were employed as machinists or machinists' helpers or machinist mechanics were members of the C.I.O.? A. Yes, sir.

Q. Did you know that on that date there were no members of the A.F.L. Machinists Union, whatever the number may be, employed by your company? A. I did.

Trial Examiner Myers: Did you know that to be a fact from January 2nd to January 25th, 1945?

The Witness: It was around perhaps the 4th or 5th that I discovered the thing that they were, but I did not from then on until this 25th.

Mr. Sapiro: That is all.

(Testimony of Warren C. Graham.)

Recross Examination

Q. (By Mr. Janigian): Now, Mr. Graham, how do you know that these men, from you employed as machinists at your yard, from January 4th or 5th until the 17th, were members of the C.I.O. Machinists Union?

A. I know we got them from there.

Q. You know you got them? A. Yes.

Q. How do you know that?

A. Because they're on our personnel man's card, above his desk was Machinist C.I.O. Templebar 3700, or whatever the number is there.

Q. And that is the only—— [178]

A. That is the only place we called for machinists.

Q. And you base your answer then on that statement, on that information that you had, that they were calling the C.I.O. Local for machinists?

A. That is correct. They were clearing through that local.

Q. And all of the rest of the cards were cleared through the respective A.F.L. locals?

A. A.F.L.

Q. Members of the A.F.L. Metal Trades Council, is that right? A. That is correct.

Mr. Janigian: I think that is all.

Recross Examination

Q. (By Mr. Sapiro): I think this morning you testified, overheard telephone conversations calling that number asking for machinists?

(Testimony of Warren C. Graham.)

A. That is correct.

Q. Out of your office? A. That is right.

Q. Or the personnel office?

A. That is right.

Trial Examiner Myers: Any other questions, gentlemen? You're excused, sir. Thank you very much.

(Witness excused.) [179]

THOMAS A. ROTELL,

called as a witness by and on behalf of the Respondent, being first duly sworn, was examined, and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Thomas A. Rotell.

Trial Examiner Myers: Will you please spell your last name?

The Witness: R-o-t-e-l-l.

Trial Examiner Myers: Where do you live, Mr. Rotell?

The Witness: 36 Santa Rosa, Sausalito.

Trial Examiner Myers: You may be seated sir. You may proceed, Mr. Stimmel.

Q. (By Mr. Stimmel): Mr. Rotell, I show you this document which has been identified as Respondent's Exhibit No. 1. Have you seen that document before? A. I have.

(Testimony of Thomas A. Rotell.)

Q. I point out to you at this time this signature here; is that your signature? A. That is.

Q. You remember signing it?

A. Very well, sir.

Q. Could you state to the Court, please, the date on which that document was actually signed?

A. January the 2nd, 1945.

Q. You're sure of that?

A. That is positive.

Mr. Stimmel: That is all. [183]

THOMAS A. ROTELL.

a witness recalled by and on behalf of the Respondent, having been previously sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Stimmel): Mr. Rotell, were you present when Mr. Wynn signed this document?

A. I was.

Q. And what date was that document signed by him? A. January the 2nd, 1945.

Q. You're sure that it was not signed on the 12th?

A. I am positive that was signed on the 2nd of January.

Trial Examiner Myers: When did Mr. Lehaney sign it, do you know?

The Witness: I would say around 11 a.m.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: Did he sign it the same day you signed it?

The Witness: The same day, yes, sir, in the offices of the company.

Mr. Stimmel: That is all.

Cross Examination

Q. (By Mr. Royster): Just a moment, I want to ask one question. When you saw Mr. Wynn affix his signature to that document, who was present other than Mr. Wynn and yourself?

A. Girls in the office.

Q. Was Mr. Lehaney present?

A. Yes, sir.

Q. And was Mr. Wynn present when you signed?

A. Yes, sir.

Q. And was Mr. Lehaney present when you signed? A. Yes, sir.

Q. And were both you and Mr. Wynn present when Mr. Lehaney signed?

A. Yes, sir. I want to stipulate, for the record, if I may that——

Mr. Sapiro: I object to any——

Trial Examiner Myers: I'll sustain the objection.

Q. (By Mr. Royster): Was Mr. Graham there that day? A. No, sir.

Q. This was on the 2nd day of January?

A. Right.

Q. Had he been there at your office on that day?

A. Not that day, no, sir.

(Testimony of Thomas A. Rotell.)

Q. On what day, if ever, was Mr. Graham at your office?

A. My recollection was January the 4th.

Q. Did you have a conversation with Mr. Graham on that occasion?

A. In the morning, yes, sir.

Q. Do you recall what that conversation was?

A. Pretty well.

Q. Will you tell us what the conversation was?

A. Mr. Graham and Mr. Lehaney came to the offices of the Council to discuss the condition of the agreement. They arrived at the office approximately 9 o'clock in the morning. A meeting was called that morning, representatives of the various unions affiliated with the Council in the [185] Oakland area in to a special session to discuss this agreement. Mr. Lehaney and Mr. Graham waited in the offices of the Council in Room 305, pending the completion of the meeting, at the termination of which Mr. Graham and Mr. Lehaney were called into the meeting of a sub-committee that was appointed through the general committee.

Q. Were you on that sub-committee?

A. I was.

Q. And who else was—comprised that committee?

A. Don Cameron, representative of the International Brotherhood of Carpenters; Mike Stafford, Pacific Coast District Executive Secretary; Tom Marr, representing the International Brotherhood of Painters; Al King, representing the Interna-

(Testimony of Thomas A. Rotell.)

tional Brotherhood of Painters; Mr. Truax, representing the International Association of Machinists; William McConnell, representing the International Brotherhood of Boiler Makers.

Q. And other union representatives?

A. And other union representatives.

Q. And this was on the 4th of January, 1945?

A. Yes, sir.

Q. What information, if any, was given to Mr. Graham at that time that you heard?

A. All the terms and the conditions of the agreement were discussed.

Trial Examiner Myers: What agreement?

The Witness: The Pacific Coast Mastership Repair agreement, effective in the San Francisco Bay area. Also the question was discussed of supplying manpower. [186]

Q. (By Mr. Royster): Did you or any one else at that meeting inform Mr. Graham that a contract had been signed between his company and the Bay City Metal Trades?

A. It was generally understood that it was, because we had it, Mr. Lehaney had a copy and we had a copy.

Q. Did Mr. Graham have a copy that you saw?

A. I don't know whether Mr. Graham had a copy or not, his representative did.

Q. Did you specifically talk with Mr. Graham about this agreement, which you say was signed on the 2nd day of January?

A. On January the 4th I did.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: Was the master agreement submitted to Mr. Graham or Mr. Lehaney?

A. A copy was attached to the stipulation, which is contained in the folder, which Mr. Lehaney had a copy of with the copy of the agreement attached thereto.

Q. And did he sign the master agreement?

A. At a later date.

Q. What date was that?

A. I would say the master agreement was signed about two weeks later. The agreements were in the printers being printed, and in the absence of the printed form of the agreement, we just signed that stipulation pending the receipt and arrival of the agreements.

Q. Where is the agreement that Mr. Lehaney signed two weeks after the——

A. We have a copy of it here, sir. [187]

Q. The one with his signature on it?

A. Yes, sir.

Q. And you say that was signed about two weeks after? A. About two weeks after.

Q. At the time that Mr. Lehaney signed Respondent's Exhibit 1, did he ask for any evidence that the Council represented the majority of the employees at Mr. Graham's plant?

A. The discussions bore that out that we did. One of the terms of the agreement is that the employment of employees are through the respective unions affiliated with the American Federation of Labor.

(Testimony of Thomas A. Rotell.)

Q. I mean, at the time that he signed the agreement was any—did he ask for any evidence that the Council represented the majority of the employees at the plant?

A. At the time of signing the agreement it was stipulated there were no employees, that they were seeking to hire employees.

Q. That is Respondent's Exhibit 1?

A. Yes, sir.

Q. And was any evidence shown to Mr. Lehaney or Mr. Graham or anybody on behalf of the Respondent, that the Council represented the majority of the employees at the plant?

A. Yes, sir——

Q. When they signed the master agreement?

A. There was no evidence shown that we represented any employee in the plant. We showed them that we represented [188] the crafts that would be necessary to be engaged to man his yard.

Trial Examiner Myers: Any other questions?

Mr. Royster: Yes.

Cross Examination

Q. (Mr. Royster): Did Mr. Graham make any statement in your presence with respect to authorizing Mr. Lehaney to sign an agreement?

A. Yes, sir.

Q. And was this—when did he make this statement?

A. January the 4th. I asked the question point blank if he had the authority to represent the firm, and the answer was in the affirmative.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: You mean Lehaney?

The Witness: Yes, sir.

Q. (By Mr. Royster): Did Mr.—did not Mr. Graham say at that time that Mr. Lehaney was then and there being authorized to sign an agreement?

A. Yes, sir.

Q. When Mr. Lehaney signed this agreement, as you testify, on the 2nd day of January, had you been advised by Mr. Graham that Lehaney had authority to sign such an agreement?

A. I didn't know that Mr. Graham existed on January the 2nd, outside of his name being mentioned through the firm's name, Graham Ship Repair.

Q. Do you know how Mr. Lehaney happened to come to your office on the 2nd day of January? [189]

A. Mr. Lehaney came to the office prior to January the 2nd, came the previous week, and on account of the holidays, the holiday week end, didn't have much time to discuss business, had other appointments, and requested him to adjourn the following Monday.

Q. On the occasion of the first visit, did you speak to him, to Lehaney? A. Yes.

Q. And what did you discuss, what was your conversation?

A. The gist of the conversation was that he was requesting information as how to get man power in order to operate a yard. I was surprised when he made the statement, I asked him what yard he was interested in, and he told me that he was the Labor

(Testimony of Thomas A. Rotell.)

Relations representative for a Graham Ship Repair. Well, that was the first I heard that the firm was going to start in the bay area. I'm familiar with all the firms, shipyards in the area, and that was a new one, and I asked him several questions. He also asked me several questions relative to the man power in the crafts, and I stated to him that we are under no obligation to the Graham Ship Repair to furnish any employees due to the man power shortage, that we had contracts with various shipyards in the area that we were obligated to supply man power, and unless he signed an agreement with the Council in toto for the A.F.L. unions, that we're under no obligation to furnish man power.

Q. Was your statement, sign an agreement in total, did you say? [190]

A. In total for all crafts affiliated with the Metal Trades Council.

Q. Just what did you mean by that statement?

A. I meant that any craftsmen that were to be engaged by the Graham Ship Repair Company would have to be members of the respective American Federation of Unions, including the machinists.

Q. Did you specifically state that you meant to include machinists?

A. That was stipulated time and time again.

Q. When you had your meeting with Mr. Graham and Mr. Lehaney on January the 4th, you stated that after a meeting of various crafts, a sub-committee was appointed?

A. Yes, sir.

(Testimony of Thomas A. Rotell.)

Q. Was there any representative of the International Association of Machinists on that subcommittee? A. Yes, sir.

Q. Who was that? A. Mr. Truax.

Q. And what office or position does he occupy?

A. International representative, that is all I know.

Q. International representative of the International Association of Machinists? A. Yes.

Q. Did you tell Mr. Graham or Mr. Lehaney what the situation was with respect to machinists at Moore Shipyard, for example?

A. Both representatives, Mr. Graham and Mr. Lehaney, were familiar with the situation as existing in the Oakland area. [191]

Q. How do you know they are familiar with it?

A. By their statements.

Q. And what were their statements?

A. Well, during the course of discussion it was developed that some work might be necessary to be moved from their yard to one of the other yards where Mr. Smith had the machinists, and they knew that there might be the possibility of work stoppages, and so forth, in the event that he was not employing machinists from 1304, we tried to clarify in his mind that we didn't think that such a condition would exist, that the amount of work that he would have to send into those yards, I couldn't see in my opinion how any work stoppages could be brought about through that affecting Moore Dry

(Testimony of Thomas A. Rotell.)

Dock, General Engineering, or United, or any other firm where the work might have went.

Q. Well, in naming those other firms, are you naming firms where the machinists are represented by Local 1304? A. That is right.

Q. Mr. Rotell, is the Bay City Metal Trades Council party to a contract with Judson-Pacific War Industries covering the employees of the yard Mr. Graham now operates?

A. The Bay City Metal Trades Council has an agreement with the Judson-Pacific War Industries covering all their yards on the Alameda side. I think there was four yards in total.

Q. And under that agreement, did Bay City Metal Trades represent machinists?

A. It did not.

Mr. Royster: I believe that is all. [192]

Trial Examiner Myers: Any questions, Mr. Stimmel?

Redirect Examination

By Mr. Stimmel:

Q. Mr. Rotell, I believe I understood you to say that at this conference on January the 2nd, you felt you were under no obligations to Graham to furnish any men, any machinists, or any men whatsoever until they had signed a contract with your organization? A. Correct.

Q. Mr. Rotell, did you ever have a contract of any kind with the Walter W. Johnson Company?

A. Yes.

(Testimony of Thomas A. Rotell.)

Q. And what did that cover, what yards?

A. The small yard that was vacated by the Pacific Bridge Company.

Q. That is not yard No. 2 at 501 First Street in Oakland; that is in Alameda, is it not, that Pacific Bridge, Mr. Janigian, or you probably know, or Mr. Graham, you know?

Mr. Graham: That is right.

Q. (By Mr. Stimmel): This yard is at 501 First Street, Oakland.

A. The Walter Johnson yard agreement was signed and the address given was their office here in San Francisco, and in parenthesis, covering Alameda yard.

Q. Then you did not have a contract with the Walter W. Johnson Company with regard to yard No. 2, this particular yard which is now known as the Graham Yard? A. No, sir.

Mr. Stimmel: That is all. [193]

THOMAS A. ROTELL,

a witness recalled by and on behalf of Bay Cities Metal Trade Council, A. F. of L., having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Janigian:

Q. Mr. Rotell, you're the Assistant Secretary of the Bay Cities Metal Trades Council?

A. Assistant to the Secretary.

(Testimony of Thomas A. Rotell.)

Q. Assistant to the Secretary? A. Yes.

Q. And you have held that position for approximately how long?

A. Oh, I would say October, 1942.

Q. And prior to that were you a delegate to the Bay Cities Metal Trades Council?

A. For about fifteen years. [195]

Q. You're a member of the Molder's Union, are you? A. I am.

Q. Have been for how many years?

A. It will be twenty years in July.

Q. The Bay Cities Metal Trades Council has been in existence approximately how long, Mr. Rotell, if you know?

A. Well, I know it was prior to the establishment of the Metal Trades Department, which was in 1909, I would say around 1900, 1901.

Q. And it has been continuously in existence ever since? A. It has.

Q. It has as its affiliated unions what type of unions, I mean what organizations?

A. Organizations whose membership are engaged in the metal industry.

Q. And what is the territorial jurisdiction of the Bay Cities Metal Trades Council?

A. The San Francisco Bay area.

Q. Also cover tributaries?

A. The tributaries, such as the Sacramento River, the San Joaquin River.

Q. I'll ask you whether or not the Bay Cities

(Testimony of Thomas A. Rotell.)

Metal Trades Council acts on behalf of its affiliated unions in matters of collective bargaining?

A. It does.

Q. And has it so acted during the past several years, or many years? A. It has. [196]

Q. Has the Bay Cities Metal Trades Council any collective bargaining agreements with shipyards in the San Francisco Bay area?

A. It has.

Q. Will you give us the names of the shipyards that the Bay Cities Metal Trades Council has collective bargaining agreements with?

A. Do you want all of them?

Q. Well, name them, yes, it won't take long.

A. The Permanente Metals, yards No. 1 and 2 in Richmond; the Kaiser Cargo Company, Kaiser, Inc., that is Richmond yards. The Moore Dry Dock Company; General Engineering Company, United Engineering Company, Pacific Coast Engineering Company, Pacific Dry Dock Company, American Ship Corporation, Hurley Marine Works, Marine Ship Corporation, Western Pipe and Steel, the General Engineering Company of San Francisco, United Engineering Company, San Francisco; Matson Navigation, San Francisco; H. E. Parsons Engineering Company; the Bay Salt Rock Company, Napa; which is engaged in ship construction; the Pollock Stockton Ship Building Company, Stockton; Comberg and Sons, Stockton; Stevens Bros. in Stockton; C. W. Wood, Stockton; Higginbottom Bros., in Stockton; Gemlin Chem-

(Testimony of Thomas A. Rotell.)

ical Company, San Francisco. Might be a couple of other minor ones.

Q. Bethlehem Steel Company, San Francisco.

A. Bethlehem Steel Company, San Francisco.

Q. Western Pipe and Steel Company, South San Francisco? A. I mentioned that, yes.

Q. Now, other than the Bethlehem Steel Company Ship Repair Yard in Alameda County and the Bethlehem Alameda Shipyards in Alameda County, do you know of any shipyard in the San Francisco Bay area which does not have collective bargaining contract with the Bay Cities Metal Trades Council? A. I know of none.

Q. And the contract signed by these various shipyards are of a uniform nature, or do they differ?

A. They are all of a uniform nature, the Pacific Coast Master Agreement.

Q. I see. Now, Mr. Rotell, you said in your testimony a few minutes ago that you first met Lehaney the last week of December, 1944, I mean in connection with this transaction. A. Yes.

Q. I presume you knew Mr. Lehaney prior to that time? A. For several years.

Q. And where did you see Mr. Lehaney?

A. In the offices of the Bay City Metal Trades Council.

Q. Had he made an appointment to see you, or did he just walk in?

A. I was out that day, and when I came back, there was a message on my desk that a Mr. Le-

(Testimony of Thomas A. Rotell.)

haney was coming up to the office, one of the girls took the message.

Q. And did Mr. Lehaney talk to you in the presence of any one else?

A. In the presence of Mr. Wynn. [198]

Q. (Mr. Janigian): Did he say whom he was representing?

A. When I asked him who, he told me the name of the firm, Graham Ship Repair.

Q. Graham Ship Repair Company. Did he tell you what his position was with the Graham Ship Repair Company?

A. Labor Relations Manager.

Q. And what did he say then, and what did you say, tell us?

A. In the course of the conversation he was requesting information on how to get manpower to man that firm, and questions that he asked, I answered.

Q. I see. And what did you say as to how he could get manpower?

A. I told him the only way that we'd be obligated to furnish manpower would be for he or his firm signing the master ship repair agreement, then we would be in a position to furnish manpower to him.

Q. Well, did he tell you the type of work that the Graham Ship Repair Company was to engage in?

A. Yes. [199]

Q. What type of work was that to be?

A. He stated to me at the time that they had

(Testimony of Thomas A. Rotell.)

about—well, he enumerated the class of work that they were going into, and stated that they had on the line about fourteen or fifteen tugs, some landing barges, and other types of vessels there to repair.

Q. Did he say that the firm was going to do any new ship construction work? A. No.

Mr. Sapiro: He didn't say that, or he said they were not. Pardon the interruption.

Mr. Janigian: No, that's all right.

Q. (By Mr. Janigian): Did he say that the firm was or was not to engage in new ship construction?

A. New ship construction was not even discussed.

Q. Well, what did he say was to be the firm's business? A. Ship repair.

Q. Ship repair?

A. For the United States Navy.

Q. Now, then, you have seen Respondent's No. 1, the agreement dated January 2nd, 1945. Was this document prepared in your office?

A. It was.

Q. At that time?

A. On January the 2nd.

Q. Who prepared it?

A. One of the girls in the office.

Q. I see. And you testified Mr. Lehaney signed it? [200] A. In the office.

Q. Now, I want to bring to your attention the statement in this agreement, or rather reference in

(Testimony of Thomas A. Rotell.)

this agreement of the Bay Cities Metal Trades Council ship repair agreement attached hereto. Now, was there anything attached to this document? A. There was.

Q. By the way, was there a duplicate original of Respondent's No. 1 that was signed by Mr. Rynn and yourself, and by Mr. Lehaney?

A. There was.

Q. And who took that duplicate original?

A. Mr. Lehaney.

Q. Did it also have the seal of the Council?

A. It did.

Q. And I'll ask you whether there was or was not attached to that duplicate original this copy of the Bay Cities Metal Trades Council ship repair agreement?

A. There was, I stapled it on myself.

Mr. Janigian: I wish to have this marked as Council's Exhibit No. 1 for identification.

(Thereupon the document above referred to was marked Council's Exhibit No. 1 for identification.)

Q. I show you, Mr. Rotell, Council's Exhibit No. 1 for identification, and ask you to inspect that document, and tell me if that is a true copy of the document which was attached to the duplicate original of Respondent's No. 1?

A. It is. [201]

Q. And given to Mr. Lehaney?

A. It's identical.

(Testimony of Thomas A. Roteli.)

Mr. Janigian: I wish to offer this Council's Exhibit No. 1 for identification in evidence.

Trial Examiner Myers: Any objection?

Mr. Royster: I'd like Counsel to state the purpose for which that Exhibit is offered.

Mr. Janigian: Well, the purpose is to show just what the agreement was that the Graham Ship Repair Company entered into. We only have this letter which refers to a ship repair agreement, and we want to show that the copy that Mr. Graham's representative had with him had this copy attached. It's obvious, the purpose is very obvious, if you want the agreement, the agreement is this document, plus this agreement which was attached thereto.

Mr. Royster: The reason for my question is this: That the complaint in this case does not attack the agreement as such, only to the extent that it may purport to cover machinists. I wonder if Mr. Janigian or the witness could point out in what respect that agreement purports to cover machinists.

Mr. Janigian: Well, it covers all employees.

The Witness: I can answer that.

Trial Examiner Myers: Just a minute now.

Mr. Royster: Unless it can be shown that this agreement purports to cover machinists in this case, I'll object to its admission.

Trial Examiner Myers: He's only offering this agreement, [202] as I understand, to show what was attached to Respondent's Exhibit No. 1, is that right?

Mr. Janigian: That is right.

(Testimony of Thomas A. Roteli.)

Trial Examiner Myers: You're not offering it for any other purpose?

Mr. Janigian: No; I mean of course, if it's in evidence, it's in evidence for all purposes, but we have Respondent's Exhibit No. 1, and we want to show that Respondent's Exhibit No. 1 had a very important attachment, the agreement itself.

Mr. Royster: Well, finally, in this case we come down to this question: Were the termination of the employees, these fourteen C. I. O. employees, on the 24th of January validated by a closed-shop agreement? If the closed shop agreement covers machinists, that is one thing. If it doesn't cover machinists, it has no bearing on the discharges.

Mr. Janigian: Well, you're attacking an agreement, and this is the agreement, Counsel, that you are attacking, because what was signed two weeks later is the exact duplicate of the agreement which was signed.

Mr. Royster: Well, I have no doubt that is so.

Trial Examiner Myers: You object to the paper going into evidence?

Mr. Royster: Yes.

Trial Examiner Myers: Any other objections?

Mr. Sapiro: Well, I object to it on the ground that it's incompetent for any purpose in this case, because it's—— [203]

Trial Examiner Myers: The contract is not going in for any other purpose, as I understand, except to show——

Mr. Sapiro: What was signed that day.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: What was attached to Respondent's Exhibit No. 1, am I right?

Mr. Janigian: That is right.

Trial Examiner Myers: I'll overrule the objections and receive the booklet in evidence, and ask the reporter to please mark it as Council's Exhibit No. 1.

(Whereupon, the document heretofore marked Council's Exhibit 1 for identification was received in evidence.)

Q. (Mr. Janigian): Mr. Rotell, following the signing of Respondent's Exhibit No. 1, did you issue any instruction to any of the unions affiliated with the Bay Cities Metal Trades Council in Oakland or Alameda, with respect to the dispatching of men to the Graham Ship Repair Yard?

Mr. Sapiro: Object to it as immaterial, as far as the 1304 is concerned, it would be hearsay and not binding on 1304.

Trial Examiner Myers: Overruled.

The Witness: I wouldn't state that I notified all unions, but I did report to the meeting of the executive board of the Bay Cities Metal Trades Council on January the 9th that we had concluded an agreement with the Graham Ship Repair Company, and instructed the representatives present to supply manpower upon requisition from the firm.

Trial Examiner Myers: By the way, did either Lehaney or Mr. Graham tell you that there was some understanding [204] or instructions or agree-

(Testimony of Thomas A. Rotell.)

ment with the United States Navy to hire only employees who formerly worked at Judson?

The Witness: No.

Trial Examiner Myers: They never told you that?

The Witness: No, sir.

Q. (By Mr. Janigian): Now, Mr. Rotell, following the signing of Respondent's Exhibit No. 1, did Mr. Graham or Mr. Lehaney make any request to you, as a representative of the Council, for any mechanics to be dispatched to the yard of the Graham Ship Repair Company.

Mr. Sapiro: Object to the question, because the word "mechanics"—

Mr. Janigian: Workmen.

Trial Examiner Myers: You withdraw the objection?

Mr. Sapiro: Yes, I'll withdraw the objection.

The Witness: On January the 4th I asked the direct question of the representatives of the firm how many machinists were needed immediately in order to start operations, and the answer was that they had to have twenty by the following Wednesday.

Q. (By Mr. Janigian): Now, was there any requisition placed with the Council between January 2nd and January 4th for the dispatching of any workmen to the Graham Ship Repair Yard?

A. With the Council itself, no. The requisitions are placed with the direct crafts where the requisitions are to be filed.

(Testimony of Thomas A. Rotell.)

Q. Were such requisitions placed, to your knowledge?

Mr. Sapiro: Objected to as calling for a conclusion of the witness, and hearsay. [205]

Trial Examiner Myers: Overruled. He might have seen the original requisitions, and they might have been signed in his presence.

The Witness: The only information I have on that is the reports made by the representatives of the various organizations that did dispatch men to the firm.

Mr. Sapiro: I'll renew my objection, and ask that the answer be stricken.

Trial Examiner Myers: Overruled.

Q. (By Mr. Janigian): And do these reports show that any men had been dispatched between the 2nd and the 4th to the Graham Ship Repair Yard?

A. I can't answer that, to my knowledge.

Q. You don't know of your own knowledge?

A. No.

Q. You're testifying on the basis of information. Did they give you any information as to whether or not any men were dispatched?

A. I know men were dispatched, but the exact dates when the requisitions were first sent in, I cannot answer.

Q. Now, coming to this meeting of January 4th, this meeting was held where?

A. In Room 205 of the Labor Temple, 16th and Capp Streets.

(Testimony of Thomas A. Roteil.)

Q. And you testified that Mr. Graham was present as well as Mr. Lehaney and representatives of the various unions affiliated with the Council, is that right?

A. I testified various representatives of the international unions. [206]

Q. International unions? A. Yes.

Q. And did you and Mr. Wynn have a conference with Mr. Graham and Mr. Lehaney prior to this meeting that was had with representatives of the various international unions?

A. There was no meeting that morning, but Mr. Graham and Mr. Lehaney both appeared in the offices of the Council, in Room 305, that is the floor above, and we told them to sort of put the—cool their heels while we held our meeting, and they sat in the offices pending the completion of the meeting.

Q. Following that there was this meeting of the sub-committee?

A. Following the meeting of the full committee of the Oakland representatives.

Q. I see. There was a meeting of a sub-committee with Mr. Lehaney and Mr. Graham, is that right?

A. In Room 205 a meeting was held with Mr. Graham and Mr. Lehaney with a committee that was appointed from the general committee meeting that was held that morning.

Q. Well, will you tell us what Mr. Lehaney said, and what Mr. Graham said at this meeting?

(Testimony of Thomas A. Rotell.)

A. We discuss——

Q. Tell us what he said, and if you can't recall the exact words, of course, just tell us the substance of what they said; what were they there for, what did they ask, or what information did they seek; just tell us what happened?

A. They wanted to get started. [207]

Q. Yes. A. To operate.

Q. Yes.

A. And the manpower was the general discussion.

Q. Was there any discussion first of all of the agreement which Mr. Lehaney had signed on behalf of the Graham Ship Repair Company two days before?

A. There was discussion on various phases of the agreement.

Q. What was said with respect to that agreement that was signed two days before?

A. Well, the main topic of discussion was the machinists question, the furnishing of machinists.

Q. Well, was there any mention made by Mr. Lehaney or you or Mr. Wynn or any of the others present with respect to the signing of an agreement two days before? A. No.

Q. Well, what did Mr. Lehaney and Mr. Graham say; what were they there for?

A. I think I stated that they were there to discuss the manpower in order to start operations.

Q. And what did they say in that connection?

A. Well, I stated that the main topic of dis-

(Testimony of Thomas A. Rotell.)

cussion was the furnishing of machinists under the terms of the agreement, and we assured them that we could furnish them all the machinists that were necessary. I also, during the course of the conversation, and supplying this manpower who was in authority in order to sign the requisitions, and the answer was that, and the agreement arrived at was that all requisitions [208] would be signed by Raymond Lehaney for the various crafts. I also distinctly asked if Mr. Lehaney was to be the official representative in order to clarify my mind of the firm, and the answer was that Mr. Lehaney would handle the Labor Relations and had authority for all matters concerning labor relations for Graham Ship Repair.

Q. Now, what was said with respect to machinists, as to the number. Was there any discussion as to the number of machinists which would be required?

A. We went into that quite at length, and we tried to ascertain as to what would be the peak as far as machinists being hired there would be, and of course we arrived at a figure that we reached their peak by their lifting, the raising of the manpower, that would require around 150 machinists, that is when they reached the peak of about 800, 850 employees.

Q. 150 machinists. A. Yes.

Q. Well, did Mr. Graham or Mr. Lehaney ask that the Council supply any given number of machinists on the 4th of January?

(Testimony of Thomas A. Rotell.)

A. I stipulated that already, that a request was made that we furnish two machinists immediately.

Q. I see.

A. And not later than Wednesday in order so that they could start their operations functioning on a paying basis.

Trial Examiner Myers: You mean Wednesday of the following week? [209]

The Witness: Wednesday of the following week, yes.

Q. (By Mr. Janigian): What was said with respect to the Council furnishing other mechanics or other craftsmen?

A. There was no amount of other craftsmen specified.

Q. I see. Now, following this meeting of the 4th, do you know whether or not machinists were dispatched to the Graham Ship Repair Yard by a union affiliated with the Bay Cities Metal Trades Council?

A. The reports in the office were that the machinists had on several occasions dispatched machinists to the Graham Ship Yard.

Trial Examiner Myers: You mean the I. A. M. machinists?

The Witness: I. A. M., Local 284.

Q. (By Mr. Janigian): Were these reports written reports, Mr. Rotell, or oral reports?

A. They were made to me personally by telephone.

Q. Do you know whether or not any A. F. L.

(Testimony of Thomas A. Rotell.)

machinists, who applied for work at the Graham Ship Repair Yard, were actually employed between the 4th and the 25th of January?

A. Will you repeat the question?

Mr. Janigian: Will the reporter please read the question to the witness?

(The question referred to was read by the reporter.)

Mr. Sapiro: I think that calls for hearsay testimony.

Trial Examiner Myers: Overruled.

The Witness: I can't answer that to my own knowledge.

Q. (By Mr. Janigian): I see. Following this meeting of the [210] 4th was there a further meeting with Mr. Lehaney or Mr. Graham, Mr. Rotell?

A. Subsequent meetings were held right on through January and February.

Q. Now, was there another meeting or conference held on or about the 16th of January?

A. I'd have to see the calendar on that one and see what day it was. Yes.

Q. Yes.

A. I think that was the exact date, January the 16th.

Q. And what meeting was held on January the 16th?

A. A meeting was held in the library of the Labor Temple on that date with representatives of the firm, and——

Mr. Sapiro: I would ask the names be given.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: Yes, give us the names.

The Witness: The Graham Ship Repair Company—well, wait a minute, you want names—on January the 16th there was representing the firm Lehaney, Mr. Graham, Mr. McDonald, the general manager, A. T. Wynn, secretary of the Council, Mr. O. F. Reim, an international representative, electrical workers; Amos W. Doane, international representative machinists, No. 24; J. D. O'Brien, Welder's Local 661; W. F. McConnell, International Representative Boiler Makers; P. W. Griffith, I. A. M. No. 284; Pete Taylor, Machinists Welders 1330; M. E. Thompson, I. A. of M.; Ernest Lohr, Boiler Makers No. 39.

Q. (By Mr. Janigian): Do you have very many more?

A. No, we're getting on some bigger names up here, as I go [211] up. Al Yatts and Luther Morris of the Steam Fitters, Joe Roberts and Drew Chionio of the Ship Fitters, Local 9; Casey Apperson, International Association of Machinists; Don Cameron, Carpenters International Union; O. K. Mitchell, Laborers 886; M. H. Stafford, Executive Secretary Pacific Coast District Metal Trades Council; Anthony Ballerini, Vice President Metal Trades Council, and Marry Bailey, representative of the Shipwrights and Joiners. They were present at that meeting.

Q. All right. Will you tell us what happened, or what was said and done at that meeting?

(Testimony of Thomas A. Rotell.)

A. At that meeting it was called for the purpose of discussing violations——

Mr. Sapiro: Might I suggest that the question was, what was said, not the purpose of the meeting.

Trial Examiner Myers: Tell us what was said, and by whom?

Q. (By Mr. Janigian): Tell us what was said, Mr. Rotell?

A. I thought that is what I started to do. I called the meeting for the purpose of discussing the violation of the agreement, namely, not hiring the machinists that were dispatched there by Local 284.

Q. Well, did you make that statement at that meeting? A. Yes.

Q. All right. Were Mr. Graham, and Mr. Lehaney present?

A. Mr. Lehaney and Mr. Graham and Mr. McDonald, their general manager, was present.

Q. This was at the meeting where all there people were present? [212] A. Yes.

Q. And then what else did you say with respect to any violation?

A. Well, the whole gist of the conversation or the meeting was that we expected the contract to be lived up to.

Q. By the way, at that meeting had there been another contract signed, I mean between the Graham Ship Repair Company and the Bay Cities Metal Trades Council prior to that meeting?

(Testimony of Thomas A. Rotell.)

A. I don't get what you mean by another contract.

Q. Well, I have—I'll show you—will you please mark this as Council's No. 2 for identification.

(Thereupon the document above referred to was marked Council's No. 2 for identification.)

Q. (By Mr. Janigian): Mr. Rotell, I show you Council's Exhibit for identification No. 2, and ask you to look at it, and tell me what that is.

A. I have in my hand the exact replica of the ship repair agreement by the Bay City Metal Trades Council, the international unions and the employer, whose signature is attached hereto, which is the official agreement of the Bay City Metal Trades Council signed by the Graham Ship Repair Company.

Trial Examiner Myers: When was that signed?

Q. (By Mr. Janigian): When was that signed?

A. This agreement was signed upon delivery from the printer. I think I have it in the record that on January 2nd we signed a stipulation and attached the same agreement in smaller form pending the receipt of the agreements [213] with the signature page contained therein.

Trial Examiner Myers: Well, approximately when was this Exhibit 2 signed?

The Witness: I would say that was signed on January the 9th, January the 9th, on a Tuesday.

Q. (By Mr. Janigian): That would be approximately a week later?

A. A week later.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: Exactly a week later?

Q. (By Mr. Janigian): Exactly a week later?

A. The reason I'm sure of the date, it was the Executive Board meeting, and the president was present at the meeting, and he attached his signature on that day.

Mr. Janigian: At this time, Mr. Trial Examiner, I wish to offer Council's Exhibit No. 2 in evidence, but ask leave to substitute a copy.

Trial Examiner Myers: Any objection?

Mr. Royster: With the understanding that this is an exact duplicate of the agreement signed January the 2nd, I have no objection.

Mr. Janigian: This is the exact duplicate.

Mr. Sapiro: Who was it signed by?

Mr. Stimmel: No objection on our part.

Mr. Sapiro: The contract is identical, but the signatures are different than that contained in Respondent's Exhibit 1.

Trial Examiner Myers: Very well.

Mr. Sapiro: On behalf of the Council.

Mr. Janigian: That is right, Bartholomew signed as [214] president.

Trial Examiner Myers: There being no objection, the pamphlet is received in evidence, and I'll ask the reporter to please mark it as Council's Exhibit No. 2.

(Whereupon the document heretofore marked Council's Exhibit No. 2 for identification was received in evidence.)

(Testimony of Thomas A. Rotell.)

COUNCIL'S EXHIBIT No. 2

AGREEMENT

This Agreement entered into by and between the Bay Cities Metal Trades Council and International Unions with the Employers whose signatures are attached hereto.

1. This agreement made this 1st day of April, 1940, shall remain in force until April 1, 1941, and shall be deemed renewed for successive periods of one (1) year unless at least thirty (30) days prior to April 1st of any year, either party shall give written notice of termination to the other. If conferences are desired, they will be held within ten (10) days immediately following the receipt of such notice.

* * * *

13. It is hereby agreed that all Employees covered by this agreement will be members of their respective unions. In the employment of new employees, the members of the unions signatory to this agreement will be given preference, providing the unions will supply competent men. In the event they are unable to supply the required help, Employees hired, before starting work, must secure a clearance through the unions who have jurisdiction over the work to be performed.

* * * *

15. It is agreed and understood that the rates of pay and working conditions covered by this agreement shall apply to new ship construction during the life of this agreement. However, the Employer,

(Testimony of Thomas A. Rotell.)

prior to bidding on new ship construction shall advise the Unions signatory to this agreement through the Bay Cities Metal Trades Council and a conference to be arranged for the purpose of discussing probable changes in wages and conditions for the construction period after the expiration of this general agreement.

* * * *

Signed by the Employers:

GENERAL ENGINEERING & DRY
DOCK CO.,

By F. H. Fox.

COLUMBIA MACHINE WORKS,

By L. K. Siversen.

PACIFIC DRY DOCK & REPAIR
COMPANY,

By T. Crowley.

UNITED ENGINEERING COM-
PANY, LTD.,

By R. E. Christy.

MOORE DRY DOCK COMPANY,

By Jos. A. Moore, Jr.

MATSON NAVIGATION CO.,

Maintenance Department,

By Carl E. Petersen.

Signed by the Committee from the Bay Cities
Metal Trades Council of the A. F. of L. and Unions
Who Are Party to the Agreement:

COUNCIL,

E. Rainbow, President.

(Testimony of Thomas A. Rotell.)

BAY CITIES METAL TRADES
COUNCIL,

A. T. Wynn, Secretary.

BAY CITIES METAL TRADES
COUNCIL UNIONS,

By E. Rainbow, Bus. Rep.

Boilermakers Local No. 6

By Andrew Chionino, Bus. Rep.

Boilermakers Local No. 9

By Fred Davis, Bus. Rep.

Boilermakers Local No. 39

By J. J. Ironsides, Bus. Rep.

Boilermakers Local No. 681

By F. H. Weibel, Bus. Rep.

Blacksmiths Locals

By O. J. Babich, Bus. Rep.

Ship Painters Local No. 961

By

Caulkers Local No. 554

By George Sanfacon, Bus. Rep.

Carpenters Local No. 1149

By John A. Tomberg, Bus. Rep.

Marine Waysmen Local No. 2116

By Frank Burk, Bus. Rep.

Sheet Metal Workers Locals

By Charles Foehn, Bus. Rep.

Electrical Workers Locals

By A. F. Bartholomew, Bus. Rep.

Shipyard Laborers No. 886

By George W. Wride,

Steamfitters Local No. 590

By

(Testimony of Thomas A. Rotell.)

* * * *

(Note: The Exhibit sets forth classifications and hourly wage scales for the following occupations: Boilermakers, Blacksmiths, Electrical Workers, Steamfitters, Painters, Carpenters, Laborers, Operating Engineers, and Sheet Metal Workers, and further that the agreement was amended from time to time, in respects not material here.)

* * * *

AGREEMENT

This Agreement, dated April 1, 1941, between Employers signatory hereto and engaged in ship repairs on the Pacific Coast, and the Metal Trades Department of the American Federation of Labor, the International Unions signatory hereto, the Pacific Coast District Metal Trades Council and its affiliated Local Metal Trades Councils;

Witnesseth

1. Scope of Agreement—The terms hereinafter expressed shall be incorporated in contracts to be executed by all employers parties hereto with the Local Metal Trades Councils having jurisdiction of the port in which such employer is located.

2. Wages—The wage scales for ship repair work on the Pacific Coast are hereby fixed at the scales set forth in Schedule "A" of the Master Contract covering new ship construction, plus 11.6%. Where application of such percentage results in a split cent, the hourly rate shall be determined by eliminating all fractions less than one-half cent and by taking

(Testimony of Thomas A. Roteil.)

the next higher cent where the fraction is one-half cent or more.

All overtime shall be double time.

Leading men shall be compensated in accordance with local practice, but in no case be less than fifteen cents per hour over the wage of the craft they are supervising.

* * * *

4. Duration of Agreements—The duration of the agreements shall be for the period of two years or for the period of the National Emergency as proclaimed by the President of the United States—or whichever is longer, and said agreements shall continue in force and effect thereafter from year to year unless either party shall desire a change, in which event, the party desiring the change shall give the other party notice in writing of the proposed change or changes at least thirty days prior to the expiration of such year; it being expressly understood, however, that on the demand of Labor thirty days prior to April 1, 1942, and on demand of either party every six months thereafter, the wage scales in said agreements shall be reviewed by the parties. If the cost of living, as shown in "Index Numbers of Cost of Goods Purchased by Wage Earners and Salaried Workers in Large Cities," published by the United States Bureau of Labor Statistics, United States Department of Labor, shall have changed at the time of the review from the cost of living at the time of the making of this agreement by five per cent or

(Testimony of Thomas A. Rotell.)

more, the wage scales shall be correspondingly adjusted. In the event the necessary data is not obtainable at the date of review, it may be secured at a later date and the wage adjustment shall be made effective retroactively to the date of review.

* * * *

In Witness Whereof, the parties hereto have hereunto set their respective names through their respective authorized officers or representatives.

Employers:

METAL TRADES COUNCILS:

Original signatures in office files.

(Note: Machinists do not appear as signatory to the Supplemental Agreement.)

* * * *

RESOLUTION

Adopted at the Pacific Coast Zone Shipbuilding Stabilization Conference, Palace Hotel, San Francisco, California, October 17, 1944, amending the Amendments to the Pacific Coast Ship Repair Agreement.

Resolved, by the representatives of Labor, Management, and Government, parties to the Amendments of the Pacific Coast Ship Repair Agreement, in attendance at the Pacific Coast Zone Shipbuilding Conference, this seventeenth day of October, 1944, that, subject to the approval of the National War Labor Board, the Amendments to the said Pacific Coast Ship Repair Agreement, adopted at the Pacific Coast Ship Repair Conference, at San Fran-

(Testimony of Thomas A. Rotell.)

cisco, California, commenced May 29, 1942, be and hereby are amended as follows:

By amending the section contained in said Amendments entitled, "Scope of Repair Work" to read as follows:

"Scope of Repair Work:

"Conversion work on a 'new vessel' shall be deemed new construction work.

"A 'New vessel' shall be construed to be any newly constructed floating structure prior to its completion and delivery to the owner.

"Repair work shall be deemed to cover all work on vessels after completion and delivery to the owner but shall not include substantial rebuilding of a vessel prior to completion and delivery to the owner in order to adapt it to a use different from that for which it was previously planned, and shall likewise not include, when performed in a yard doing solely new construction work, any work performed on a vessel after delivery to the owner but prior to completion of a voyage in the service for which it was built.

"When a new vessel is placed in or on drydocking facilities which are located in or are under the control of a ship repair or combination yard for work which by its nature requires the use of drydocking facilities, all work essential to accomplishing such purpose performed in or on such drydocking facilities shall be repair work.

"Nothing herein shall be construed to prevent the

(Testimony of Thomas A. Rotell.)

employer from continuing to perform new construction work on said vessel while in drydock.”

Resolved Further, that the effective date of these Amendments shall be the seventeenth day of October, 1944.

Resolved Further, that the Chairman of the Shipbuilding Stabilization Committee is hereby authorized and directed to submit the above Amendments to the National War Labor Board for approval.

Shipbuilding Commission
National War Labor Board

November 6, 1944

In the Matter of: The Parties to the Pacific Coast
Master Agreement Covering New Ship Construction and to the Amendments to the Pacific Coast Ship Repair Agreement.
Case No. 25-2207-A.

RULING

By virtue of and pursuant to the authority vested in it by the National War Labor Board in its Directive Order of August 9, 1943, the Shipbuilding Commission, acting upon the request of the above-named parties, dated November 1, 1944, rules as follows:

I. The amendments to the Pacific Coast Master Agreement Covering New Ship Construction and the amendments of the Amendments to the Pacific Coast Ship Repair Agreement as adopted by resolution of the parties in conference in San Francisco on October 17, 1944, as hereby approved.

(Testimony of Thomas A. Rotell.)

II. This adjustment may be made effective as of October 17, 1944. It is recommended that any retro-active payment that may result from this Ruling be made in conformity with the policy of the National War Labor Board as stated in its resolution of April 2, 1943.

III. This Ruling conforms to the policies of the National War Labor Board based on Executive Orders Nos. 9250 and 9328, and the policy Directive of May 12, 1943, issued by the Director of Economic Stabilization.

WILLIAM H. McPHERSON, Public.

ELMO P. HOHMAN, Public.

LEE G. PAUL, Industry.

ROBERT G. HOWLETT, Industry.

LUCIEN KOCH, Labor.

EDWARD B. ROWAN, Labor.

Bay Cities Metal Trades Council

Main Office

Labor Temple, 2940 - 16th Street

Telephone Underhill 3055 and Market 1225

San Francisco 3, California

ACCEPTANCE OF AGREEMENT

It Is Mutually Agreed to by and Between the Employer signatory hereto, engaged in Ship Repair work in San Francisco Bay Area and the Bay Cities Metal Trades Council of the American Federation of Labor and its affiliated unions, that the 1940 Bay

(Testimony of Thomas A. Rotell.)

Cities Metal Trades Council Ship Repair Agreement
as amended shall remain in force and effect in ac-
cordance with the terms contained herein.

Dated this 2nd day of January, 1945.

GRAHAM SHIP REPAIR CO.,

Name of Firm

501 1st St., Oakland,

Address of Firm.

(seal) By RAYMOND H. LEHANEY,

Dis. Labor Relations.

BAY CITIES METAL TRADES
COUNCIL,

By A. T. WYNN,

Secretary.

By A. F. BARTHOLOMEW,

President.

Q. (By Mr. Janigian): Mr. Rotell, was there
a meeting had with Mr. Lehaney on the occasion
of the signing of Council's Exhibit No. 2?

A. I wouldn't call it a meeting. The agreements
arrived from the printer, and Mr. Lehaney hap-
pened in the office, and I gave him the copies to
sign.

Q. And the copies were signed in the office?

A. In the office.

Q. Of the Bay Cities Metal Trades Council?

A. Yes.

(Testimony of Thomas A. Rotell.)

Q. Was Mr. Lehaney given a duplicate original, I mean a signed copy of Council's Exhibit No. 2?

A. He was.

Q. Now, getting back to this meeting of the 16th; you said you were discussing violations of the agreement by the Graham Ship Repair Company. Now, was there any statement made by Mr. Graham on that occasion as to what his contention was, or what did he have to say? [215]

A. I don't recall the exact conversations.

Q. Well, do you recall the gists of them, what was said by you and every one else; tell us very briefly just what transpired at that meeting?

A. I stated that we called the meeting to register our complaint on the violations. Our information as reported to the Council was that the machinists were dispatching men to be hired and they were being turned away, and the purpose of the meeting was to rectify that situation.

Q. I see. Now, what was said on that—in that connection? I mean, you said you made a statement. Did any one else make any statements?

A. Well, several of those present made statements.

Trial Examiner Myers: All right, what did Graham, McDonald—

Q. (By Mr. Janigian) What did Graham say he would do, or Mr. Lehaney say he would do in that connection; what was their explanation?

Trial Examiner Myers: Did they say they'd rec-

(Testimony of Thomas A. Rotell.)

tify it, or did say that they wouldn't pay any attention to it, or what?

The Witness: I want to state that Mr. Lehaney stated that they will rectify the situation; that Mr. McDonald, their General Manager, was introduced to the group, because we questioned who had the authority there, Mr. McDonald, Mr. Close, or Mr. Lehaney, and it was borne out that Mr. McDonald was over Mr. Close, and what he said went.

Q. (By Mr. Janigian) And was there anything else said about that at that time? [216]

A. No. As I stated, the firms' representatives promised that the whole situation would be cleared up, and insisted again that machinists be dispatched down there, that they would be put to work, that they needed them bad.

Q. All right. Did you, following that meeting, contact the Machinists Local Union to have them dispatch machinists?

A. I didn't have to contact them, the representatives of the Machinists Local Union were present.

Q. Machinists to the Graham Ship Repair Yard would be dispatched from which local of the International Association of Machinists?

A. Local 284, Oakland.

Q. Following that meeting was there a further meeting with Mr. Graham or Mr. Lehaney?

Trial Examiner Myers: You mean with respect to machinists?

(Testimony of Thomas A. Rotell.)

Mr. Janigian: Yes, with respect to this controversy.

The Witness: Yes. I was pretty active on it practically daily following the situation up, with the result that another meeting was called January the 25th, and I would say approximately the same individuals present at that meeting, were present at the meeting of the 16th.

Q. (Mr. Janigian) You won't have to read their names.

A. With the addition of three other individuals.

Trial Examiner Myers: Representing the Unions?

The Witness: Representing the A. F. L. Unions, yes, sir. At that meeting Mr. Lehaney was there alone, Mr. Graham or any other representative of the firm was not with him.

Q. (By Mr. Janigian) I see.

A. That was held at 10 A. M. in the library of the Labor [217] Temple.

Q. And then what was done at that meeting?

A. We had the show down on the machinists situation.

Mr. Sapiro: I move that that be stricken out.

Trial Examiner Myers: Strike it out.

Q. (By Mr. Janigian) What was said; what did you say and what did they say, give us the conversations or the substance of the conversations?

A. The substance of the conversations were that they were going to fulfill their end of the contract by putting machinists to work.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: "They" you mean Graham?

The Witness: The Graham Ship Repair Company, or the Council would have to consider that their agreement had been abrogated and would be under no obligation to furnish any other craftsmen to them.

Q. (By Mr. Janigian) You say machinists, you mean A. F. L. machinists?

A. A. F. L. machinists.

Q. And what was said by Mr. Lehaney on that occasion?

A. Mr. Lehaney told us what was transpiring in the yard.

Trial Examiner Myers: Tell us what he said.

The Witness: Well, he stated that it was more of a jurisdictional dispute within the firms' supervision as to who was boss, who had the power to do this, and that, that he had the power, and what he said was going to go, so the proof of the pudding was that after the meeting of the 25th.

Mr. Sapiro: I move that that be stricken out.

Trial Examiner Myers: Strike it out. [218]

The Witness: He was the boss of the record.

Q. (By Mr. Janigian) Now, getting back to this alleged jurisdictional fight among the supervisory officials of the company, what did Mr. Lehaney say on the subject of the A. F. L. machinists not being employed in the yard?

A. Well, they tried to place the brunt—

(Testimony of Thomas A. Rotell.)

Q. No, what did he say, because otherwise Mr. Sapiro will object.

Mr. Sapiro: Oh, I haven't objected very much.

Trial Examiner Myers: What did he say, sound so says he wouldn't hire any A. F. L., and so and so says.

The Witness: The statement made by Mr. Lehaney were that the machinists superintendent and the hull superintendent would not allow A. F. L. machinists to go to work there. Them are the exact words.

Q. (By Mr. Janigian) Who was the hull superintendent? A. Mr. Close.

Q. And machinists superintendent was——

A. Gentleman by the name of Rogers.

Q. And what did Mr. Lehaney say he would do about that situation?

A. He said he's going to get it straightened out if it's the last thing he does.

Trial Examiner Myers: And when you told Lehaney that day that you would no longer be obligated to send any more A. F. L. craftsmen over to the Graham Ship Repair Company, what did you actually tell him?

A. I stated that unless he put machinists from the A. F. L. [219] to work that we would consider the agreement abrogated and would be under no obligation to furnish any other craftsmen.

Trial Examiner Myers: You mean in the future, or would you take out what you already sent there?

(Testimony of Thomas A. Roteli.)

The Witness: In the future, with the thought in mind that if we had demands from the other firms which we had contracts with and we had to supply man power, that we would withdraw our people and put them into firms where we had contracts.

Q. (By Mr. Janigian) What, if anything, was said with respect to C. I. O. machinists then working at the Graham Ship Repair Yard?

A. The information that was conveyed to the Council——

Q. No, what was said?

A. Was that there was no C. I. O. machinists working there. That is what they kept on telling us right along.

Q. Who said that? A. Mr. Lehaney.

Q. Said there were no C. I. O. machinists working there?

A. Right. Also, Mr. Batts, their bookkeeper or timekeeper, informed me that there were no C. I. O. machinists on the pay roll during all that entire time.

Trial Examiner Myers: You mean from January 2nd up to January 25th?

The Witness: I would say from about January the 5th up to that time.

Trial Examiner Myers: Up to the 25th?

The Witness: That is right. [220]

Q. (By Mr. Janigian) Did you phone Mr. Graham or Mr. Lehaney in connection with this business? A. Yes, several times.

Q. And did you discuss with Mr. Graham the

(Testimony of Thomas A. Rotell.)

question of the companies enforcing the agreement which it had signed with the Bay Cities Metal Trades Council?

A. Well, my conversation with Mr. Graham was on another line. The enforcement of the agreement was discussed mostly with Mr. Lehaney.

Q. I see.

A. And the only time Mr. Graham came into the discussions was where he was present at a meeting.

Q. I see. Was there a further meeting had with Mr. Graham after the 25th of January?

A. Yes, there was another meeting held on February the 15th, at 2 P.M. in the library.

Q. Well, I mean prior to the 26th.

A. Not to my recollection.

Q. On and after the 25th of January were A. F. L. machinists employed at the yard?

A. From the information the Council received, yes.

Mr. Janigian: Will you please mark this as Council's Exhibit for identification next in order.

(Thereupon the document above referred to was marked Council's Exhibit 3 for Identification.)

Q. (By Mr. Janigian) Mr. Rotell, I show you Council's Exhibit for identification No. 3, and ask you to identify this. [221]

A. That is the roster of the organizations affiliated with the Bay Cities Metal Trades Council.

Mr. Sapiro: I understand the purpose is to

(Testimony of Thomas A. Rotell.)

show that 1304 is not affiliated with the Bay Cities Metal Council, and I will so stipulate.

Mr. Janigian: I was joking with you. I wanted to show the affiliation of the Council.

Mr. Sapiro: Object to it as immaterial, and cluttering up the record.

Mr. Janigian: No, it's not cluttering up the record at all. I wish to offer this Council's Exhibit No. 3, a roster of affiliation of the Bay Cities Metal Trades Council, in evidence.

Trial Examiner Myers: Any objection.

Mr. Stimmel: No objection.

Mr. Sapiro: Objected to as immaterial.

Trial Examiner Myers: I'll overrule the objection and receive the paper in evidence, and ask the reporter to please mark it as Council's Exhibit No. 3.

(Thereupon the document heretofore marked Council's Exhibit No. 3 for identification was received in evidence.)

COUNCIL'S EXHIBIT No. 3

Council's Exhibit No. 3 contains the names and addresses of locals affiliated with the Bay Cities Metal Trades Council and in the City of Oakland, 26 locals are listed.

Q. (By Mr. Stimmel) Mr. Rotell, did you at any time discuss with Mr. Graham or Mr. Close or Mr. Lehancy the matter of passively allowing

(Testimony of Thomas A. Rotell.)

them to use the C. I. O. machinists after January the 2nd?

A. At the meetings that were held, yes, that was discussed. Mr. Graham specifically requested if we would not let him live up to all phases of the agreement except the clause which had to do with the machinists, and we told him absolutely not.

Mr. Royster: May I ask when this conversation was?

Trial Examiner Myers: Yes, fix the time.

The Witness: That was at the meeting of January the 25th.

Trial Examiner Myers: Well, Graham wasn't there, you said.

The Witness: Well, the 16th then, the meeting that Mr. Graham was there. There might have been another meeting in between those two. I couldn't find all my notes this morning.

Q. (By Mr. Stimmel) Mr. Rotell, didn't Mr. Lehaney or [223] Mr. Graham point out to you that it was necessary that they use C. I. O. machinists in that yard located on the estuary because of conditions that prevailed there, that they couldn't dry dock their boats, any boat that they had worked on, and they would be terribly interfered with by reason of that fact, and that you passively acquiesced in them using the C. I. O. machinists in the interval?

A. We were not concerned by any allegation as to what may happen in the dry docking of vessels, the Graham Ship Repair Company was in

(Testimony of Thomas A. Rotell.)

no position to dry dock it's own vessels, not having a dry dock. It was stipulated by the firm that the machinists work that they had to do was taken care of in the uptown shops, and the only work that would be involved in dry docking, would have to be sub-contracted not by them but by the Navy itself, that the Navy allocated the vessel to be placed in dry dock to a particular yard.

Cross Examination

Q. (By Mr. Sapiro) You have mentioned a list of repair yards which the Council has collective bargaining agreements with; among those you mentioned some in Alameda County, those are the—will you name those in Alameda County again—well, American Ship, for instance, you have a collective bargaining agreement with American Ship?

A. We have. [224]

Q. You don't supply any machinists to them?

A. That is right.

Q. You mentioned that you had a collective bargaining agreement with United in Oakland, Alameda County.

A. I did.

Q. You don't supply any machinists to them, do you?

A. That is right.

Q. You said you had a collective bargaining agreement with General Engineering in Oakland, and you don't supply any machinists to them?

A. That is right.

Q. The three that I have mentioned, those are all supplied by C. I. O. 1304?

(Testimony of Thomas A. Rotell.)

A. That is correct.

Q. You also mentioned that you had a collective bargaining agreement with Moore Dry Dock in Oakland?

A. That is right.

Q. And is it true and correct when I say that C. I. O. 1304 supplies the machinists to that organization?

A. Well, let me say 1304 clears them, whether they supply them or not, I'll stipulate that they clear them.

Q. They come through that organization?

A. They come through that organization.

Q. Now, what is the situation as to Bethlehem, Alameda?

A. We have no agreement with Bethlehem, Alameda. We have been certified for all crafts except the machinists.

Q. And as to that——

A. Through an N. L. R. B. election.

Q. And as to that 1304 was certified as the bargaining agent? [225]

A. They won the bargaining rights.

Q. And it was a separate unit in the organization for collective bargaining purposes?

A. In that yard it was so set up.

Q. Now, what other yards, repair yards, are there in Alameda County that I have failed to mention which you have collective bargaining agreements, and which C. I. O., in which the machinists are cleared through C. I. O. 1304?

(Testimony of Thomas A. Rotell.)

A. Well, I'm not acquainted with what yards the C. I. O. has agreements with in Alameda County.

Q. What about General Engineering in October?

Mr. Janigian: You mentioned General Engineering.

Mr. Sapiro: No, United. Did I mention General?

Mr. Janigian: Yes.

Q. (By Mr. Sapiro) What about Hurley Marine?

A. We do not furnish the machinists there.

Q. C. I. O. 1304 furnishes the machinists?

A. I presume they do.

Q. You know that, don't you, Mr. Rotell?

A. I don't know for an actual fact. I'll say that 1304 clears them.

Q. But insofar as any affiliate of yours is concerned, they don't clear any machinists?

A. That is true. You want to ask me why we don't.

Q. I'm asking the question.

A. That was off the record.

Q. What about Pacific Coast Engineering, have you a collective bargaining agreement with them?

A. We have. [226]

Q. And what about the machinists, they cleared through 1304?

A. I presume they are.

Q. At least no affiliate of yours clears them?

A. I can't truthfully answer that question, not knowing.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: Does your contract with these companies, where you said they are cleared through 1304, provide for any—cover the machinists in any of these plants?

The Witness: The agreement that those firms that have been mentioned by Mr. Sapiro, all signed the identical agreement, which provide that the Bay Cities Metal Trades Council also furnish the machinists.

Trial Examiner Myers: Where is that statement, in Council's Exhibit 2?

The Witness: That is the repair agreement here. We'll have to go into the middle of the book here and go into section No. 2.

Trial Examiner Myers: And does it cover any wages, hours, and working conditions for any machinists?

The Witness: Yes.

Mr. Royster: What page is that on, if I may ask?

The Witness: Right in the middle of the book, page 33, section No. 2, and I quote—entitled wages: "The wage scales for ship repair work on the Pacific Coast are hereby fixed at the scale set forth in Schedule A of the master contract covering new ship construction." And Schedule A contains the classification machinists. [227]

Trial Examiner Myers: Where.

The Witness: In the new construction agreement.

Trial Examiner Myers: Is there still another agreement?

(Testimony of Thomas A. Rotell.)

The Witness: This is the agreement covering new ship construction.

Mr. Janigian: For the sake of the record, I think that should go in too.

Trial Examiner Myers: What page is that, 33?

The Witness: Yes.

Trial Examiner Myers: What section did you say?

The Witness: Section No. 2, sir.

Trial Examiner Myers: Will you find it for me?

The Witness: It's on 35 on this one.

Trial Examiner Myers: Go ahead, Mr. Sapiro.

Q. (By Mr. Sapiro) Now, your so-called collective bargaining agreement with these firms that I have mentioned is identical with that Exhibit No. 2, the little short pamphlet, which you say was attached to Respondent's Exhibit 1, at the time it was executed? A. Yes.

Q. That is correct, isn't it? A. Identical.

Q. Identical? A. Yes.

Q. All those firms that I have mentioned, except the Bethlehem, where there is no signed contract?

A. There is no signed contract at Bethlehem.

Q. That is true. Now, have you the same collective [228] bargaining agreement with Cryer and Son?

A. The same collective bargaining agreement is signed with that firm. That is a wooden boat yard.

Q. And machinists employed by that firm are cleared through, or furnished by 1304?

(Testimony of Thomas A. Rotell.)

A. I don't know whether they engage any machinists or not.

Q. Well, if they do, none of your affiliates clear?

A. I can't answer that to my knowledge.

Q. What about Stone and Son?

A. That is another wooden boat yard.

Mr. Janigian: In Oakland, or Alameda?

Mr. Sapiro: Yes, I'm confining my examination to Oakland only.

Q. (By Mr. Sapiro) That is in Oakland, isn't it? A. W. F. Stone.

Q. It's in Alameda County, it's really in Alameda.

A. I don't know the location of it.

Q. And you have the same collective bargaining agreement with them as has been shown here?

A. Yes.

Q. Words and figures identical? A. Yes.

Q. And insofar as you know, no A. F. L. union clears any machinists to that organization?

A. That is correct.

Q. Now, there is another concern over there by the name of Curtola Ship Repair which you have the same collective bargaining agreement with?

A. We have no ship repair agreement with Curtola, new construction agreement.

Q. Well, do you supply—does any of your affiliates supply the machinists to that organization, so far as you know?

(Testimony of Thomas A. Rotell.)

A. As far as I know, they do not.

Q. Now, at the first meeting that you had with Mr. Lehaney, on January the 2nd, 1945, as you have already stated, there were no employees in the yard?

A. The information conveyed by the firm's representative, there were no employees.

Q. Now, at the hearing, or the meeting that you had in which Mr. Graham was present—I'll withdraw that. You had a meeting on January the 4th at which Mr. Graham was present, is that correct? A. Yes.

Q. And have you given us all of the conversation that took place at that time, that you can remember?

A. There was no transcript, so I'd have to say no.

Q. Well, do you remember anything further that was discussed?

A. No, I think I have stipulated all the discussion.

Q. You have stated all that you can remember?

A. Yes.

Q. Was this document that is in evidence, Respondent's No. 1, signed on January 2nd, discussed?

A. No, it was not discussed.

Q. Was any reference made at that conversation to the [230] effect that Lehaney had signed an agreement on the 2nd of January?

(Testimony of Thomas A. Rotell.)

A. Yes, that brought about my question to Mr. Graham, what was Mr. Lehaney's authority.

Q. Yes. And you wanted to know from Mr. Graham whether or not Lehaney had the authority to sign the document which he had signed?

A. That is right, I wanted to ascertain for my own knowledge whether that was his position and capacity or not.

Q. So didn't you say to Mr. Graham, "Lehaney signed a contract a couple of days ago, I want to know whether or not he had the authority"?

A. I wouldn't put the question that way.

Q. You didn't put it that way? A. No.

Q. What did you say about it?

A. I just come right out and asked Mr. Graham who was in authority there to handle the labor relations and negotiate for the firm.

Q. So at that time you didn't tell Mr. Graham that Lehaney had already signed?

A. I'm not working for the firm, that was Mr. Lehaney's responsibility.

Mr. Sapiro: I'll ask that that be stricken out, Mr. Examiner.

Trial Examiner Myers: Strike out the answer and read the question to the witness, please, Mr. Reporter.

(The question referred to was read by the reporter.) [231]

The Witness: I assumed that he had that knowledge.

(Testimony of Thomas A. Rotell.)

Mr. Sapiro: Move that that be stricken out.

Trial Examiner Myers: Strike it out. Will you answer the question, please?

Q. (By Mr. Sapiro) I asked him whether you told him that or not?

A. I didn't tell him that, no.

Q. Were any terms of the agreement discussed at that time?

A. Various phases of the agreement were discussed.

Q. Was one of these booklets gotten out?

A. There were several copies on the desk.

Q. And did you at that time refer to the ship repair agreement, this printed pamphlet or printed booklet?

A. We did.

Q. And referred to it?

A. No, I didn't actually take the book in my hand and refer to it. I knew the answers without looking in the book.

Q. And they asked you questions and answers about this agreement?

A. Right.

Trial Examiner Myers: You're referring to Council's Exhibit 2?

Mr. Sapiro: Yes, Mr. Examiner.

Mr. Janigian: I think it's Council's Exhibit 1 that he's referring to.

Trial Examiner Myers: 1, that is right.

Q. (By Mr. Sapiro): Now, did they read or discuss various provisions of Council's Exhibit No. 1 at that time? [232]

(Testimony of Thomas A. Rotell.)

A. No, not at that time.

Q. Now, the next time Mr. Graham was there was, I think you testified, on January the 16th, when the question of a violation came up?

A. That is correct?

Q. Now, on that day, was the contract exhibited to Mr. Graham?

A. No, there was no contracts there at that meeting at all.

Q. Well, did you open the meeting?

A. I did.

Q. And just tell us exactly what you said at that time?

A. Well, I think I stated before that we never kept any transcript of the meeting; I couldn't exactly state what I stated.

Trial Examiner Myers: Well, tell us what you remember.

The Witness: I opened the meeting by telling them the purpose of the meeting, that we were there to discuss the violation of the agreement, what we considered a violation of the agreement.

Q. (By Mr. Sapiro): Was the word "agreement" mentioned at that time? A. Yes.

Q. Was Mr. Graham there at that time?

A. Yes.

Q. Did he say anything about whether he knew that an agreement had been signed or had not been signed prior to that time?

A. That question never came up. There was no

(Testimony of Thomas A. Rotell.)

doubt in my [233] own, in Mr. Graham's mind, that there was no agreement signed.

Trial Examiner Myers: Did you say signed agreement, or just agreement?

The Witness: A signed agreement, there was no doubt in my mind——

Trial Examiner Myers: No, wait a minute; at this meeting, did you tell Mr. Graham or Mr. Lehaney or Mr. McDonald that they violated a signed agreement, or did you say that they violated the agreement?

The Witness: The agreement, I never used the phraseology signed.

Q. (By Mr. Sapiro): And there was no protest on their part that they hadn't signed any agreement? A. There was no protest whatever.

Q. Mr. Graham was there?

A. Mr. Graham was there.

Q. And what did Mr. Graham say, if you can remember, as distinguished from what McDonald said or Lehaney? A. I do not recollect.

Q. Did he take part in the discussion?

A. Oh, from time to time he interjected himself in the conversations.

Q. You have no recollection as to anything that he ever said?

A. No, his spokesmen were doing the talking.

Q. Now, on this meeting of January the 25th, which took place in the morning about 10 a.m, as

(Testimony of Thomas A. Rotell.)

I understand, the conversation was between you and Mr. Lehaney? [234] A. Yes.

Q. And no one else was present?

A. Oh, yes.

Q. I mean, on behalf of the company.

A. Mr. Lehaney, let me make sure here, Mr. Lehaney was the only representative of the firm present.

Q. Have you given all the conversation that you can remember as to what you said?

A. I have.

Q. Did you at that time tell him that if the C. I. O. machinists were retained on the job, that you would pull the job?

Trial Examiner Myers: You mean the C. I. O.

Q. (By Mr. Sapiro): I mean the C. I. O. machinists, yes.

A. I never make those statements. I have not the power to pull any job.

Q. Did you say that that would be considered a—such a violation, that the A. F. L. employees in the yard would have to withdraw from employment there? A. I gave him to understand that——

Q. Well, tell us what you said, if you can, Mr. Rotell?

A. Well, I'm going to try to put the exact words; that unless A. F. L. machinists were employed there, we would have to cease supplying him any further men, and if it necessitated from demands of other yards, we would have to withdraw our people and place them in the yards where we had the contracts.

(Testimony of Thomas A. Rotell.)

And I want to stipulate for the record, that is only by Council action, that that can be done. [235]

Trial Examiner Myers: You mean, when you say you want to stipulate, you want to say, is that what you're trying to convey?

The Witness: That is right.

Cross Examination

Q. (By Mr. Royster): Did Mr. Lehaney at any time tell you, Mr. Rotell, that he had already signed an agreement with Local 1304?

A. He never told me that he signed an agreement with 1304.

Q. Did he tell you that he had any type of agreement with 1304 with respect to machinists?

A. He stated that he never did sign an agreement with 1304.

Q. On January 2, 1945, when Mr. Lehaney came to your office and signed Respondent's Exhibit No. 1, did you and Mr. [236] Lehaney go over the provisions of Council's Exhibit No. 2, which was attached to Respondent's No. 1?

Mr. Janigian: No, Council's No. 1. Now, I'm going to object to the question on the ground it's incompetent, irrelevant, and immaterial. A person who signs an agreement is presumed to have read it.

Trial Examiner Myers: Will you read the question, please?

(The question referred to was read by the reporter.)

Trial Examiner Myers: Overruled.

(Testimony of Thomas A. Rotell.)

The Witness: Will you repeat the question, please?

Trial Examiner Myers: Will the reporter please read the question?

(The question referred to was read by the reporter.)

The Witness: We did not go over the provisions of it. He stated that he knew what the agreement was. He wanted to get cleared up, the machinists' situation.

Q. (By Mr. Royster): Wanted to get cleared up in the machinists' situation, that your answer?

A. Practically in that language; that was the bone of contention, the machinists.

Q. Let me see if I understand you: Mr. Lehaney came in on the 2nd; did you then present him with what I incorrectly described as Council's Exhibit No. 2, with Council's Exhibit No. 1, and tell him that these were the terms and conditions under which Bay City Metal Trades would supply help to the plant?

A. I told him that in order for him to have help supplied, [237] that he would have to sign the master agreement covering all employees to be furnished by the A. F. L. unions, and I strictly stressed on machinists, Local 284.

Q. Then on January 4, Mr. Lehaney returned with Mr. Graham, you had already told him under what conditions you would furnish help to him, had you not? A. I had.

Q. And Mr. Lehaney had signed the agreement,

(Testimony of Thomas A. Rotell.)

but then you went through the same procedure on January 4, did you, with Mr. Graham?

A. No, on January 4, it seemed that some row started over in Oakland over there about the signing of the agreement by 1304 interjecting itself into it, and they came up to the meeting to get——

Q. By “they” you mean Mr. Graham and Mr. Lehaney?

A. Mr. Graham and Mr. Lehaney, a further understanding.

Q. Now, you also testified that on January 4th you were told by Mr. Lehaney or Mr. Graham that they were in need of twenty machinists, ten machinists? A. Twenty.

Q. And that they must have them by the following Wednesday. Did any organization affiliated with Bay City Metal Trades supply those twenty machinists? A. They attempted to.

Q. How do you know they attempted to?

A. By the men that were dispatched to the firm, by the union’s records.

Q. Were any of them employed, placed on the pay roll of Graham at that time? [238].

A. Not to my knowledge.

Q. I’m not quite clear on your testimony with respect to this situation. You testified, as I understand it, that you weren’t concerned about dry dock facilities at Graham Ship Repair Yard, that much of the machinist work was to be done uptown; was that your testimony?

A. The type of work that the firm’s representa-

(Testimony of Thomas A. Rotell.)

tive told me that they would have involved work that did not necessitate dry docking it could be performed in uptown shops, not having the facilities to do their own machine work.

Q. Well, do I understand from that, that at first you didn't contemplate that there would be need for machinists at Graham's?

A. No, I knew there would be need for machinists. Any vessel going into a yard for repairs has a certain amount of machinists work on it, irrespective of whether it's below the water line or above or inside the hull.

Q. I think I understand you now. Then you did understand that after it left Graham's yard it would not need dry docking?

A. It might need dry docking, but I specifically requested or asked the Graham's representatives, who had the allocation of that work, they said they do not subcontract themselves, that the Navy subcontracts that work and allocates it to a specific yard for dry docking, and what specific work must be done for the dry docking operations, which we had no objection to going into, Moore, General, United, wherever they had their dry docks being done by 1304 machinists. [239]

Q. When did Mr. Graham tell you that he had a prospective need for 150 machinists?

A. That was borne out that morning.

Q. This is on January 4?

A. January 4.

Q. Did he tell you within what period of time

(Testimony of Thomas A. Rotell.)

he expected employment so to increase as to necessitate that number of machinists?

A. As soon as their ceiling was lifted to reach 850, that it would necessitate that amount of machinists in order to successfully operate.

Q. Did he tell you what progress he was making in having that ceiling lifted?

A. Yes, he told me he was having a tough time.

Q. Beg pardon.

A. He told me that he was having a tough time to get it raised.

Q. Well, did you have any understanding with Mr. Graham as to the probability of when they would need 150 machinists at that yard?

A. I stated if and when the ceiling would have been raised to 850.

Q. Do you have any definite date in mind?

A. No, I have no definite date; it could have happened overnight.

Mr. Royster: I think that is all.

Trial Examiner Myers: Any questions, Mr. Janigian?

Mr. Janigian: Just a few more. [240]

Redirect Examination

Q. (By Mr. Janigian): At this meeting of January 25th, Mr. Rotell, was there any mention made by Mr. Lehaney of a conversation he had with Mr. Smith? A. Yes.

Q. What did Mr. Lehaney say as to any conversation he had with Mr. Smith?

(Testimony of Thomas A. Rotell.)

Mr. Sapiro: I'll object to that as pure hearsay, not in the presence of Mr. Smith, and not binding on Mr. Smith, or the East Bay.

Trial Examiner Myers: Overruled. I'll take the answer; if he doesn't connect it up, I'll entertain a motion to strike.

The Witness: He stated that Mr. Smith held several meetings with him and tried to force the firm to signing the agreement with 1304 to supply the machinists, and his answer at all times was that under no consideration would he sign an agreement with him. They already had an agreement signed with the Bay City Metal Trades Council for the machinists.

Trial Examiner Myers: When was the first time he told you that?

The Witness: Right from the start, sir.

Trial Examiner Myers: January 2?

The Witness: No, not January 2.

Trial Examiner Myers: January 4?

The Witness: January 4 was the first mention of him talking with Mr. Smith. [241]

Trial Examiner Myers: And did he mention that at the January 9th meeting?

The Witness: He mentioned that practically at every meeting that we held.

Trial Examiner Myers: Well, do you remember of him saying it at a January 9th meeting?

The Witness: On January 9th his discussions were held in the office with me, there was no meeting on January the 9th.

(Testimony of Thomas A. Rotell.)

Trial Examiner Myers: Well, when I say meeting, I mean met with you.

The Witness: Oh, yes.

Trial Examiner Myers: I'm not characterizing, when I say meeting, I mean met with you. When he met with you on January 9th, did he make that statement?

The Witness: He did, yes, sir.

Q. (By Mr. Janigian): And what about the January 16th meeting, or conference?

A. Mr. Lehaney and myself were in constant touch since the signing of the agreement; every time we discussed the situation, he told me that Mr. Smith had attempted to meet with him and did meet with him and tried to get him to sign the agreement.

Trial Examiner Myers: And all this time he was telling you that he didn't have any C. I. O. machinists in the plant at all?

The Witness: No, there were C. I. O. machinists, I ascertained from him that there were three C. I. O. machinists there on January the 4th, and his instructions were for [242] their removal from the yard, that they were illegally hired.

Q. (By Trial Examiner Myers): Did he tell you that they were hiring other C. I. O. machinists right along?

A. No, the information was conveyed to me, that at no time did he have over three C. I. O. machinists in there.

Q. You mean, he told you?

(Testimony of Thomas A. Roteli.)

A. Yes, sir. And I had the names of those machinists who were purportedly working there at that time.

Q. And he said he only had three machinists in the plant? A. Three.

Q. And he told you that on January 4th he needed twenty right away, that is by the following Wednesday?

A. As late as January the 13th—no, 12th. Mr. Lehaney told me that he had three CIO machinists in there, and that they were going to be laid off at noon that Saturday, and for me to call the A. F. L. Union, to have on hand Monday morning an equal amount of machinists to start operations.

Q. Well, he didn't hire any on that following Monday, did he, any A. F. L. machinists?

A. I couldn't say whether he did or not, sir.

Q. Well, you know there weren't any A. F. L. machinists up there up to the 25th of January, don't you know that?

A. No, I do not know, sir.

Q. Well, I mean, all your dealings with the machinists, the I. A. M. and Graham and Lehaney, and you're complaining right along that they wouldn't hire any A. F. L. machinists, didn't that bring home to you the fact that there weren't any up there? [243]

A. Well, I can answer that, the information conveyed by Mr. Lehaney was that two of those three were A.F.L. machinists carrying two cards, so the answer was yes and no.

(Testimony of Thomas A. Rotell.)

Q. What two?

A. Well now, I just don't know which two.

Q. Was it Ashcraft, was he the one that carried them? A. It was two of those three.

Q. Hostetler or Potter?

A. Mr. Lehaney stated that when they informed the men that they were to be laid off, they said, "Well, we're A.F.L. men," and they broke out their book and showed it to the.

Q. How about the other twenty or fourteen that they had over there?

A. Well, they were hired at the gate, I guess. We had no knowledge of them being employed.

Q. Well, you knew that a ship repair plant can't get along without machinists and they need them right away? A. That is right.

Q. And they were begging you for them, and you say they were sending people out there, and they wouldn't hire them?

A. They also stated at that time, sir, that they didn't have much work, and there was no need of hiring any more.

Mr. Janigian: I'd make the observation on that point, Mr. Trial Examiner, that that is one of the riddles in this case, information I have from the employer shows that on [244] January 3rd they had three machinists, and on January 15th they had three machinists. How many they had in between I don't know, but that three wasn't increased until after the 15th I think that I want to have clarified.

Trial Examiner Myers: All I can go by is this

(Testimony of Thomas A. Rotell.)

Exhibit 6 of the Board, that what I had before me, when I was questioning the witness.

Mr. Janigian: That is right, they still had three.

Trial Examiner Myers: Well, we'll get that stipulation in the record. Go ahead.

Q. (By Mr. Janigian): Now, Mr. Rotell, now getting back to this meeting of January 25th; you said that mention was made as to—by Lehaney about the conversation with Smith and Smith's demand for a contract; did or did not Mr. Lehaney state that Mr. Smith set a dead line for the signing of a contract with the C.I.O.?

Mr. Sapiro: Objected to as leading and suggestive.

Trial Examiner Myers: Overruled.

The Witness: That was mentioned, yes, that Mr. Lehaney conveyed the information to the meeting that Mr. Smith stated that a dead line was set for Monday morning.

Trial Examiner Myers: What Monday morning.

The Witness: The following Monday morning.

Q. (By Mr. Janigian): Following the 25th?

A. Following the 25th, that there would be a cessation of work and a picket line established if he didn't comply.

Q. Was a picket line established?

A. Never.

Mr. Sapiro: Wait a minute. I move that that be [245] stricken out as pure hearsay, and not binding on the petitioner in this case.

Trial Examiner Myers: Overruled.

(Testimony of Thomas A. Rotell.)

Mr. Sapiro: May that be taken subject to the same motion to strike, Mr. Examiner?

Trial Examiner Myers: Very well.

Mr. Janigian: It's the conversation, and if you want——

Trial Examiner Myers: I have ruled in your favor, Mr. Janigian.

Mr. Janigian: Thank you, Mr. Examiner.

Q. (By Mr. Janigian): Now, you mentioned that the various firms that you referred to as having contracts with the A.F.L. had signed Council's Exhibit No. 1, in answer to a question by Mr. Sapiro. Now, I show you Council's Exhibit for identification No. 4——

(Thereupon the document above referred to was marked Council's Exhibit No. 4 for identification.)

Q. (Continuing): And ask you to identify this. I have in my hand the master agreement covering new ship construction between the Pacific Coast Ship Builders and the Metal Trades Department, American Federation of Labor, Pacific Coast District, Metal Trades Council, and the local Metal Trades Councils, and affiliated international unions dated April the 23rd, 1941, which I identify as the original master agreement signed, covering the Pacific Coast.

Trial Examiner Myers: That is not the agreement that is referred to in Council's Exhibit No. 2, is it, this blue book?

The Witness: This is the ship repair agree-

(Testimony of Thomas A. Rotell.)

ment, [246] this is the new construction agreement, the original new construction agreement? [247]

Q. (By Mr. Janigian): Now, Mr. Rotell, the master contract covering new ship construction referred to in the ship repair agreement—withdraw that. Is Council's Exhibit No. 4 the master contract covering new ship construction referred to in the ship repair agreement? A. It is.

Q. Now, having particular reference to the agreement which commences on page 33 and 34 of Council's Exhibit No. 2, and which purports to have the date April 1st, 1941, I'll ask you whether or not that agreement was not actually signed, that is the master agreement, on the 25th day of April, 1941?

A. That is correct, and it was dated back to be effective April the 1st; that was the effective date, April the 1st.

Q. And Council's Exhibit No. 4, I'll ask you whether or not Council's Exhibit for identification No. 4 was the master agreement covering new ship construction which was executed following a coast-wide conference on the Pacific Coast?

A. It is.

Q. Which commenced in February 3rd and finished it's deliberation on April 23rd, 1941?

A. Yes, in Seattle, Washington, that is.

Q. And following that conference was there or was there not held a repair conference? [248]

A. There was.

Q. At Seattle? A. Yes.

(Testimony of Thomas A. Rotell.)

Q. And an agreement was reached with respect to the repair of ships? A. That is it.

Q. And that was signed on April 25th?

A. Yes.

Q. Now, will you show me, so that Mr. Myers can see it, ask you whether or not this agreement or form which starts on the top of page 34—

A. That is what is termed as the master ship repair agreement for the Pacific Coast.

Mr. Janigian: Now, I'd like to offer, Mr. Trial Examiner, Council's Exhibit No. 4 in evidence.

Trial Examiner Myers: Any objection, gentlemen?

Mr. Sapiro: I don't see the materiality of it. I object to it as immaterial.

Mr. Janigian: Well, Mr. Trial Examiner, Council's Exhibits No. 1 and 2 are not complete, at least so far as the record is concerned, until we have Council's Exhibit No. 4, because reference is made to No. 4, to Council's Exhibit No. 4. And I might state, that even the agreements which were introduced on behalf of the C.I.O. contained the same reference. In fact they are the identical agreements.

Trial Examiner Myers: Well, the C.I.O. didn't offer any papers in evidence, the Board did.

Mr. Janigian: Oh, the Board, I mean the Board's—the agreements offered in evidence by the Board referred to [249] in fact contained the same language as I pointed out to you on page 34.

Trial Examiner Myers: I'll overrule the objec-

(Testimony of Thomas A. Rotell.)

tion, and receive the booklet in evidence, and ask the reporter to please mark it as Council's Exhibit No. 4.

(Thereupon the document heretofore marked Council's Exhibit 4 for identification was received in evidence.)

COUNCIL'S EXHIBIT' No. 4

Council's Exhibit No. 4 is the Master Agreement Covering New Ship Construction between the Pacific Coast Shipbuilders and the Metal Trades Department, A. F. of L., the Pacific Coast District Metal Trades Council, the Local Metal Trades Council, and affiliated International Unions, dated April 23, 1941. The agreement provides for a closed-shop for job classifications included thereunder and contains a "Schedule A" which sets forth the hourly rates for approximately 54 occupational classifications in new ship construction, including Machinists. The agreement is signed by the employers to be covered and by the various international craft unions, including the International Association of Machinists.

Q. (By Mr. Janigian): Mr. Rotell, at this meeting of January 25th, did or didn't—I'll withdraw that. At this meeting of January 25th, 1945, what did Mr. Lehaney say on the subject of A.F.L.

(Testimony of Thomas A. Rotell.)

machinists reporting to the Graham Ship Repair Yard for work and being turned away?

A. Well, he made quite a holler about it, and he laid the responsibility on supervision in the yard.

Q. I mean, what did he say, just tell us that; you say responsibility. We want to know what he said, to whom did he lay the responsibility?

A. He laid the responsibility to the hull superintendent, Mr. Close, and also the machinists superintendent, Mr. Rogers.

Q. What did he say with respect to Mr. Close and Mr. Rogers?

A. That they would not hire them.

Q. He said they would not hire A.F.L. machinists?

A. Would not hire A.F.L. machinists.

Mr. Janigian: I think that is all.

Trial Examiner Myers: Any other questions, gentlemen?

Mr. Royster: No more.

Q. (By Trial Examiner Myers): Now, do you consider your [250] contract with General Engineering & Dry Dock Company, Columbia Machine Works, Pacific Dry Dock and Repair Company, and United Engineering Company, and Moore Dry Dock Company, and Matson Navigation Company, as having been abrogated? A. No, sir.

Q. Do you consider your contracts with any other companies where you don't supply machinists as being abrogated?

A. We don't consider it abrogated. The agree-

(Testimony of Thomas A. Rotell.)

ment is in full force and effect. There has been hearings held on the question of the machinists, which has quite a lengthy history behind it, and on account of the decisions that were handed down and what transpired at the time, we were in no other position but to abide by the decision handed down.

Q. Handed down by whom?

A. By the War Labor Board.

Trial Examiner Myers: Any other questions, gentlemen?

Mr. Sapiro: Just one other question.

Recross Examination

Q. (By Mr. Sapiro): There was one decision handed down by the National Labor Relations Board in which this identical question was raised, and it was against the contention of the A.F.L., particularly the Bay City Metal Trades Council, isn't that correct?

Mr. Janigian: You have in mind the Bethlehem Alameda case as to the unit being set up.

Mr. Sapiro: Yes, it's a matter of record.

Mr. Janigian: The Board knows that.

Trial Examiner Myers: We'll go into the law later. [251] Any other questions of this witness?

Mr. Janigian: No.

Trial Examiner Myers: You're excused sir.

(Witness excused.)

CHARLES B. TRUAX,

called as a witness by and on behalf of the Bay Cities Metal Trades Council, A. F. of L., being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, please?

The Witness: Charles B. Truax.

Trial Examiner Myers: And where do you live, Mr. Truax?

The Witness: 2242 44th Avenue, San Francisco.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Janigian.

Q. (By Mr. Janigian): Mr. Truax, do you hold a position with the International Association of Machinists? A. I do.

Q. What is that position? [252]

A. Grand Lodge representative.

Q. What are your duties as Grand Lodge representative, Mr. Truax?

A. Service the locals in the bay area.

Q. And you have a particular assignment in the bay area? A. I do.

Q. What is that assignment?

A. Administration of Lodge 284 and District 115.

Q. And I'll ask you whether or not you know Mr. Graham and Mr. Lehaney? A. I do.

Q. When did you first meet Mr. Graham and Mr. Lehaney? A. January the 4th.

Q. You were here in the hearing room when

(Testimony of Charles B. Truax.)

some testimony was given as to a meeting held on January the 4th, 1945? A. That is right.

Q. And Mr. Rotell testified to such a meeting?

A. Yes.

Q. Were you present at that meeting?

A. I was.

Q. Will you tell us briefly what was said at that meeting, particularly by Mr. Al Wynn, A. T. Wynn?

A. There were two meetings held that morning, I think the first one was called for 8 o'clock, which was confined to representatives of the American Federation of Labor affiliates. At that meeting the machinists were asked if they could supply the men.

Q. Who asked that, who made that statement?

A. Al Wynn.

Q. Al Wynn asked the machinists if they could supply the men? A. That is right.

Q. What did Al Wynn say with respect to this Graham Ship Repair Yard?

A. Said they had a signed agreement there.

Q. Yes, asked you if you could supply the men?

A. That is right.

Q. And then what——

A. What our position was on it, and I told him we could supply the men and would supply the men.

Q. That was asked specifically of the machinists representative, is that right?

A. That is right. There was three representatives of the machinists there, and I spoke for the three.

(Testimony of Charles B. Truax.)

Trial Examiner Myers: Did Mr. Wynn say how many men you were supposed to supply?

The Witness: No, sir.

Trial Examiner Myers: Did you ask him?

A. I asked him approximately how many men it would take and he said that as the organization or the company grew that it would probably take up to 150 or 200 men.

Q. (By Mr. Janigian): Now, that morning was there another meeting with Mr. Graham and Mr. Lehaney?

A. There was, following that meeting.

Q. Following that meeting the same morning?

A. I made a telephone call and went downstairs, they said the meeting would be in a room downstairs. I went downstairs [154] to this meeting, and everybody was present there waiting for me to appear, and Mr. Graham and Mr. Lehaney were—I was introduced to them, those two people, that was my first meeting of the two, to my knowledge.

Q. Now, what was said at that time about an agreement?

A. Well, at that time again the machinists were asked, and they were asked by Mr. Graham and Mr. Lehaney if they could supply the men, and if they would supply the men.

Q. What men did they have in mind?

A. The machinists.

Q. And what did you say when they asked you whether you could supply the men?

(Testimony of Charles B. Truax.)

A. I said we could and we would.

Q. Was there any mention made of the fact that an agreement had previously been signed?

A. There was.

Q. Who made that mention of that fact?

A. Mr. Rotell brought that up in this manner: That he asked Mr. Graham if Mr. Lehaney had the authority to handle the labor relations and had the authority to sign the agreement which he had signed, and Mr. Graham said that he had, did.

Q. Now, was there any mention made of the number of machinists who were to be supplied?

A. There was.

Q. How many?

A. I asked them to give us reasonable time in which to supply these men, they expected top craftsmen, and he said, "Well," he said, "we'll need twenty-five or thirty men by [255] next week, and at least——"

By Mr. Royster: May I interject here. I'm not quite clear as to whom the witness is testifying about at this moment.

Q. (By Mr. Janigian): Who made that statement, Graham or Lehaney?

A. Both Graham and Lehaney.

Q. Twenty-five you say?

A. Twenty-five or thirty.

Q. By next week?

A. By next week, that it would require at least twenty. I said, "Twenty-five or thirty men is quite a few men to pick up right like that."

(Testimony of Charles B. Truax.)

Q. And following that meeting did you then take steps to have men dispatched to the Graham Ship Repair Yard? A. I did, I had prior to that.

Q. You had prior to that meeting?

A. That is right.

Q. Had you dispatched men to the Graham Ship Repair Yard?

A. I had sent men down there prior to that.

Q. And then were those men put to work?

A. They were not.

Trial Examiner Myers: When did you first send some men?

The Witness: Some time in the latter part of December.

Q. (By Mr. Janigian): Now, in January had you sent any one to the yard?

A. I did, I sent two men. I think it was on the morning of the 5th, I think, by golly, come to think of it, this one man was sent down there on the afternoon of the 4th. [256]

Q. The same day that you had the meeting?

A. I'm quite sure of that.

Q. Now then, in January the first man who was sent from 284 to the yard for Graham Ship Repair Yard for work was on the afternoon of January 4th. is that right? A. Following this——

Q. Meeting, yes.

A. This meeting, that is right.

Trial Examiner Myers: Who asked you to send men down in December?

The Witness: Nobody.

(Testimony of Charles B. Truax.)

Trial Examiner Myers: How did you happen to send them down?

The Witness: I heard about the yard in December, the latter part of December, a couple of guys come up there, telling me about hearing about this new yard going to start up, and asked about getting a job down there. I said, "Well, go down and see if you can get a job, until we see what is cooking," and they come back and reported that there was no work down there, and that there was nobody working.

Q. (By Mr. Janigian): What happened to this man who was sent on the 4th of January to the Graham Yard for work?

A. He came back, I didn't talk to the man, the dispatcher told me, he says, "Why," he says, "no use sending men down there. I've sent this fellow down there." And the next morning is when I really talked to the dispatcher, and he said, "I've sent two more down, and they have returned," [257] he says, "You tell me that they want twenty men down there, and they don't, they're sending them back." The following morning there was one or two more sent down, and they bounced back, according to the dispatcher. I called on the telephone, I called Graham's Yard down there to speak to Mr. Graham or Mr. Lehaney. They were, I was informed, in Los Angeles. I asked the girl who was next in charge and in regard to hiring men, and she referred me to Mr. Bates. I told Mr. Bates that the company had made a request of us for

(Testimony of Charles B. Truax.)

twenty men and I had sent men down there and they were bouncing back. Now what was the matter. He says, "Well, I don't know anything about it, I'll refer you to Mr. Close." And Mr. Close came to the telephone, identified himself. I told him the same story, that the company had requested the men, the men had been dispatched, and were coming back. He said there was no work there in the yard for machinists, they didn't need any.

Q. And about when was this that you had this conversation with Mr. Close.

A. That was, I'm pretty sure, on the 5th of January.

Q. Following the 5th of January were men still dispatched to Graham Ship Repair Yard?

A. That is right, there was several different occasions there were men sent down there.

Q. And were any of the men dispatched from Local 284 put to work at the Graham Ship Repair?

A. There were none put to work to my knowledge until the 25th. [258]

Trial Examiner Myers: January 25th?

The Witness: That is right.

Q. (By Mr. Janigian): After this conversation you had with Close on the 5th day of January did you have any further conversations with Mr. Close?

A. Yes, I have had a lot of conversations, several of them maybe in a group.

Q. Did you ask him why he wouldn't put your men to work?

A. No, I went to—got in touch with Rotell to

(Testimony of Charles B. Truax.)

follow that out. I immediately got in touch with Rotell and said, "What is the score here, somebody is giving somebody the run around."

Q. And——

A. (Interposing): And Rotell told me he would call them up out there. I contacted Rotell inasmuch as it was an agreement by this Bay City Metal Trades, and had been authorized by our organizations to do as such, that that is where it should be handled from.

Q. Now tell me if you had any further conversations with Mr. Lehaney on this business of machinists being sent down and being turned back?

A. Yes, I did.

Q. When did you have that conversation?

A. I think that was about the 23rd or 24th, something like that.

Q. Of January? A. Of January.

Q. In the meanwhile had you had any further conversations [259] with Close on this subject of your members being sent back after being referred to the job?

A. I don't remember whether I did or not. You mean between the 5th and the 25th?

Q. That is right.

A. Between that period?

Q. That is right.

A. I couldn't truthfully say. It seems as though there was a conversation, but I kind of place it in my mind as after the 23rd or 24th.

Mr. Janigian: That is all.

(Testimony of Charles B. Truax.)

Trial Examiner Myers: Any questions, Mr. Stimmel?

Cross Examination

Q. Well, I thought perhaps that the other union men affiliated with the A.F.L., did they report to the hiring hall that machinists of the C.I.O. union were employed, and they would report that to you, and you had knowledge of that fact?

A. That I had knowledge of the fact that there were C.I.O. employed in there?

Q. Yes, as machinists, during the same period of time that you were dispatching machinists down from your hiring hall [260] and they were refused employment?

A. Well Mr. Graham, trying to straighten out what is in my mind or your mind, Mr. Graham stated down there and Mr. Lehaney did, that there was two or three machinists in the yard there.

Trial Examiner Myers: And when did they make that statement?

The Witness: January the 4th.

Trial Examiner Myers: Did they say with what organization these two were associated?

The Witness: I don't know. They asked me what disposition would be made of it, and I said they would follow the same procedure as any other man, they would be sent to the hall and re-dispatched.

Trial Examiner Myers: Did they tell you that they were C.I.O. men?

The Witness: No, I don't know whether the

(Testimony of Charles B. Truax.)

statement was made, or I was given the impression, that two of them were 68 members, Lodge 68 I.A.M. affiliated with the American Federation of Labor.

Q. (By Mr. Royster): Does Local 284 International Association of Machinists supply machinists to any ship repair yard in Alameda County?

A. To any ship yard?

Q. Any ship repair yard. A. Yes.

Q. In Alameda County? A. Yes.

Q. Which one?

A. Graham, I know of.

Q. Do you know of any others?

A. Not right off hand.

Q. Is your organization the International Association of Machinists signatory to Council's Exhibit No. 1, this ship repair agreement?

A. As far as I know they are. I never seen them sign it.

Q. What was your answer?

A. I said as far as I know they are, I never seen them sign it.

Q. Well, as far as you know they are not then, is that a fair inference from your answer?

A. No. I say as far as I know they are, but I never [262] witnessed the signature.

Q. Can you show me any place in the book where International Association of Machinists appears as a signer to any of those agreements or supplemental agreements?

A. I don't know whether it's in this one or not.

(Testimony of Charles B. Truax.)

I know I have one that is signed by George C. Castleman, International Vice President.

Q. My question is as to this one, is it in there?

Mr. Janigian: Castleman is in the new ship construction agreement.

Trial Examiner Myers: What one have you got, have you got it with you?

The Witness: No, I'm sorry I have not.

Trial Examiner Myers: You're not referring to the master agreement covering new ship construction, are you?

The Witness: Yes, there is one like that, and then there is one like this one too, I'm pretty sure.

Trial Examiner Myers: Well, the document speaks for itself.

Mr. Royster: All right, the witness doesn't know.

Mr. Janigian: However, I might make the statement, as Council's Exhibit No. 1 and No. 2 show, this Pacific Coast master ship——

Mr. Sapiro: I object to your arguing.

Mr. Janigian: Wait a minute, I'm making a statement, I have a right to make a statement.

Trial Examiner Myers: Let him make his statement.

Mr. Janigian: The Pacific Coast master ship agreement [263] which was dated April 1st, but which was actually signed on April 25th, is inserted in this document, but the signatures are deleted, the signatures, original signatures in office files. I had a photostatic copy of that agreement that was signed, and that contains the signature of the In-

(Testimony of Charles B. Truax.)

ternational Association of Machinists and Mr. Castleman. I'll furnish that photostatic copy in evidence.

Mr. Royster: Well, the answer to my question as to Council's Exhibit No. 1 is that the witness doesn't know, that they're not a signatory to it, is that correct, but that he has never seen a signature affixed. The record will show.

Trial Examiner Myers: Well, proceed with the examination.

Q. (Mr. Royster): What is the membership of 284, Mr. Truax, Local 284?

A. I couldn't tell you exactly.

Q. Could you tell me approximately?

A. Sixteen or seventeen hundred.

Q. Do you know what—does Local 284 admit to membership any but journeymen machinists?

A. Sure.

Q. Do you know what percentage of that sixteen or seventeen hundred are journeymen machinists.

A. No, I couldn't tell you exactly, I can give you my estimate.

Q. What would your estimate be?

A. My estimate would be that there would be around a thousand.

Q. That were journeymen? [264] A. Yes.

Q. Where are the——

A. Better than that even.

Q. Is there one employer who employs the bulk of the membership of Local 284?

(Testimony of Charles B. Truax.)

A. I don't know if 284 is on trial or not.

Q. It's not on trial at all. I'm just looking for information.

Mr. Janigian: Wait a minute, I was going to interpose an objection. I don't see the materiality to the question. If you want to inquire into the numerical strength of the A.F.L. machinists locals——

Trial Examiner Myers: I'll sustain the objection. [265]

Mr. Royster: I have a stipulation to propose, Mr. Examiner, as follows: "It is hereby stipulated by and among the parties to this proceeding, that the following named were employed by Graham Ship Repair Company on the dates given, and that they continued in that employment until 7 p.m. on January 25, 1945: Frank Shaffer, hired January 20, 1945. Gus B. Bernes, hired January 16, 1945. Thomas F. Wright, hired January 22, 1945. Benjamin F. Clark, hired January 24, 1945. Jim H. Clark, hired January 24, 1945. William (Bill) Searing, hired 1/23/45. C. W. Lewis, hired 1/25/45. Albert Sequeira, hired 1/24/45. It is further stipulated that the above named were during the month of January, 1945, members in good standing in East Bay Union of Machinists, Local 1304, C.I.O., and that all production and maintenance employees employed by Graham Ship Repair Company at its Oakland plant in classifications other than machinists, machinist maintenance mechanics, machinist helpers, machinist apprentices, and machinist

(Testimony of Charles B. Truax.)

trainees from January 2 to January 25, 1945, were cleared through and were members of the respective A. F. of L. unions affiliated with the Bay Cities Metal Trades Council."

Trial Examiner Myers: Do you so stipulate, Mr. Royster?

Mr. Royster: I so stipulate.

Trial Examiner Myers: Mr. Janigian?

Mr. Janigian: I so stipulate.

Trial Examiner Myers: Mr. Stimmel?

Mr. Stimmel: I do.

Trial Examiner Myers: And Mr. Sapiro? [267]

Mr. Sapiro: I do. [268]

W. C. GRAHAM,

a witness recalled by and on behalf of the Council, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Janigian:

Q. I show you, Mr. Graham, Council Exhibit for Identification No. 5, and ask you to identify it.

A. This is the record of the Graham Ship Repair Company of the number of employees, production employees on the payroll between the dates of January 2nd and January 25th, inclusive, showing the total number of production employees and the total number of machinists employed on the various days.

(Testimony of W. C. Graham.)

Mr. Stimmel: I believe that record is from the 1st, [273] including the 1st.

The Witness: Yes, from the 1st to the 25th, inclusive.

Q. (By Mr. Janigian): By production employees you mean all employees, exclusive of clerical? A. And officers.

Q. Executives and supervisory employees, with the right to hire and fire? A. That is correct.

Q. You have one column of figures at the top of which you have "Total Employees." Do those figures indicate the total employees, less the machinists; or does that also include machinists?

A. That includes machinists.

Q. Then the next column, you have "Total Machinists," and that is spelled "Mach."

That would be merely the machinists, no one else? A. That is correct, and helpers.

Q. Machinists and helpers, and so on, all those in the machinist category?

A. That is correct.

Mr. Janigian: I would like to offer this in evidence.

Trial Examiner Myers: Any objection, gentlemen?

Mr. Royster: No objection.

Trial Examiner Myers: There being no objection, the paper is received in evidence, and I will ask the Reporter [274] to mark it as Council Exhibit No. 5.

(The document heretofore marked Council

(Testimony of W. C. Graham.)

Exhibit No. 5 for identification, was received
in evidence.)

COUNCIL'S EXHIBIT No. 5

GRAHAM SHIP REPAIR CO.

3/19/45

January	Total Emp.	Total Mach.
1		
2	8	0
3	19	3
4	36	3
5	42	3
6	41	3
7	10	1
8	67	3
9	80	3
10	87	3
11	97	3
12	108	3
13	106	3
14	97	2
15	137	3
16	161	4
17	165	4
18	171	4
19	174	4
20	186	5
21	180	4
22	227	6
23	200	7
24	212	10
25	225	16
26		
27		
28		
29		
30		
31		

(Testimony of W. C. Graham.)

Trial Examiner Myers: Are there any other questions?

Mr. Janigian: No other questions of Mr. Graham?

Trial Examiner Myers: Do you gentlemen want to ask Mr. Graham any questions?

Mr. Royster: I have a few questions I would like to ask him about that payroll.

Trial Examiner Myers: Very well, go ahead.

Cross Examination

By Mr. Royster:

Q. Mr. Graham, under the heading of "Total Machinists," on January 7th appears the figure "1." What significance has that figure "1" with respect to January 7th?

A. That was probably a Sunday.

Q. Does the "1" mean that on that day there was just one machinist working?

A. That is correct.

Q. It does not mean on that date there was only one machinist on your payroll?

A. That is correct.

Trial Examiner Myers: You had three on that date?

The Witness: That is correct, yes.

Trial Examiner Myers: The 7th was a Sunday.

The Witness: Yes.

Q. (By Mr. Royster): Well, again, the 14th is a Sunday, and the column of "Total Machinists" shows 2. On the previous day and on the succeeding day it shows 3.

(Testimony of W. C. Graham.)

A. That is the same situation. The 14th being a Sunday, we had two machinists, a total of 97 production employees.

Q. But it does not mean that one machinist had been dropped from the payroll?

A. That is correct. [276]

ALFRED T. ROGERS,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name, sir?

The Witness: Alfred T. Rogers.

Trial Examiner Myers: Will you spell your last name for the Reporter, Mr. Rogers?

The Witness: R-o-g-e-r-s.

Trial Examiner Myers: Where do you live, Mr. Rogers?

The Witness: Berkeley, 2419 Durant Avenue.

Trial Examiner Myers: You may proceed, Mr. Stimmel.

Q. (By Mr. Stimmel): Mr. Rogers, I show you this paper. Are you familiar with that record?

A. Well, I went to work there the 22nd of January.

Q. You went to work there the 22nd?

A. That is right.

(Testimony of Alfred T. Rogers.)

Q. You do not know then what happened before that? A. No.

Q. On the 22nd, on the date specified on this document, thereafter did you requisition the machinists that were hired?

A. Well, not directly. That was done by the machinists' leaderman.

Trial Examiner Myers: The machinists who?

The Witness: Leaderman.

Q. (By Mr. Stimmel): Who is the machinists' leaderman?

A. I never did know him long enough to know his name.

Mr. Smith, do you know?

Trial Examiner Myers: If you do not know, just say you don't know.

Q. (By Mr. Stimmel): Mr. Rogers, do you know to your knowledge whether any of these machinists employed during the period since you were superintendent of machinery were A. F. of L. machinists, whether they were all C. I. O. machinists?

A. I don't know.

Q. Mr. Rogers, you attended the meeting of the Metal Trades Council on January 16th, did you? A. Yes, I did.

Q. Could you state to the Court, please, the statement made at that time as to the purpose of the meeting being called?

A. Well, yes, we went there to ask the Metal Trades to release us from the obligation that we

(Testimony of Alfred T. Rogers.)

evidently had. We wanted to ask their permission to put C.I.O. machinists in there.

Mr. Janigian: That is January 16th?

The Witness: I believe that is the date.

Q. (By Mr. Stimmel): Who made that statement, Mr. Rogers?

A. Mr. Graham, and Mr. Graham and I before we went there, [278] Mr. Graham made that statement that we were going over to ask the permission of the Metal Trades to release us from this agreement. Mr. Graham made that statement to me.

Q. After you arrived at the meeting, was such an announcement made by Mr. Rotell?

A. Not to my knowledge, I don't remember that.

Q. Did any official connected with the Metal Trades Council make a statement at that meeting in your presence to the effect that the meeting was called for the purpose you mentioned heretofore?

A. No.

Mr. Stimmel: That is all.

Trial Examiner Myers: Any questions, Mr. Janigian?

Mr. Janigian: No.

Trial Examiner Myers: Mr. Royster?

Mr. Royster: No questions.

Trial Examiner Myers: What was said at that meeting of January 16th and by whom?

The Witness: By whom?

Trial Examiner Myers: Yes.

The Witness: Well, it was agreed that the A.

(Testimony of Alfred T. Rogers.)

F. of L. were going to use their prestige to get work, get ships for Graham Ship Repair.

Trial Examiner Myers: Is that all you remember that was said? [279]

The Witness: Oh, no.

Trial Examiner Myers: Tell us everything you remember that was said and who said it.

The Witness: Well, Mr. Graham made the statement that if he wasn't released from this agreement, it was putting him in a position where he could not supply, and he asked the meeting to, on the strength of that, to release him, and it was promised by the A. F. of L. that they were to do everything in their power to give him men and work. They were even going so far as to try to get work from Washington.

Trial Examiner Myers: What agreement did Mr. Graham want to be released from?

The Witness: The supposed agreement that the A. F. of L. machinists were working in the yard. That was the agreement he wanted to be released from.

Trial Examiner Myers: When did you start your connection with the company?

The Witness: The 22nd of January.

Trial Examiner Myers: What was your job?

The Witness: Marine Superintendent.

Trial Examiner Myers: Are you still Marine Superintendent?

The Witness: That is right.

(Testimony of Alfred T. Rogers.)

Trial Examiner Myers: How did you happen to be at this meeting on January 16th? [280]

The Witness: I was invited by Mr. Graham.

Trial Examiner Myers: That was prior to your employment?

The Witness: Oh, the 16th—wait a minute—no, I wasn't to a meeting on January 16th.

Trial Examiner Myers: When was the meeting?

The Witness: I wouldn't know what date it was. It was after the 22nd of January.

Trial Examiner Myers: Was it after the 25th of January?

The Witness: Maybe after that.

Trial Examiner Myers: What is your best recollection?

The Witness: I wouldn't know.

Trial Examiner Myers: Well, you started there on what day of the week with the company?

The Witness: On a Monday.

Trial Examiner Myers: Do you remember whether that meeting was held during the first week of your employment?

The Witness: No, I don't.

Trial Examiner Myers: Do you remember there was some trouble at the plant there about the C.I.O. machinists and the A. F. of L. machinists **being** there on the same day?

The Witness: Yes, there was that. I was there then.

Trial Examiner Myers: Do you remember the

(Testimony of Alfred T. Rogers.)

A. F. of L. machinists started coming into the plant on the 25th of January? [281]

The Witness: That is right.

Trial Examiner Myers: Was this meeting after that or before that?

The Witness: After that.

Trial Examiner Myers: How long after that?

The Witness: Well, now, several days, I wouldn't know exactly. [282]

RAYMOND H. LEHANEY,

a witness called by and on behalf of the Bay Cities Metal Trades Council, A. F. of L., having been duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Raymond H. Lehaney.

Mr. Janigian: How do you spell your first name?

The Witness: R-a-y-m-o-n-d.

Q. (By Mr. Janigian): What is your occupation, Mr. Lehaney?

A. Public Relations Director for the Western Congress of Teamsters covering the eleven Western States. [288]

Q. Are you employed by the Graham Ship Repair Company? A. That is right.

(Testimony of Raymond H. Lehaney.)

Q. When were you first employed by that firm and in what capacity?

A. Approximately around the week of December, the 21st or 22nd, I guess, in the capacity of Labor Relations man.

Trial Examiner Myers: 1944?

The Witness: 1944.

Q. (By Mr. Janigian): Where were you employed?

A. In Los Angeles.

Q. You were employed by whom?

A. By Mr. Graham.

Q. And at the time of your employment did Mr. Graham tell you what your duties were to be?

A. Yes. Mr. Graham said that the duties would involve labor relations and that he wished the yard to go along very well; that he intended to start here and wanted someone familiar with labor relations to handle labor relations.

Q. And will you state just what you were to do?

A. Well, I asked Mr. Graham what the duties would involve and he said I would have full charge of everything to do with the Unions, and the harmony between Union and Management.

Q. Was there any statement made with respect to the signing of a collective bargaining agreement in the course of your discussions with Mr. Graham? [289]

A. No, not at that time.

Q. Did you have any subsequent conversations

(Testimony of Raymond H. Lehaney.)

with Mr. Graham on the subject of signing a collective bargaining agreement?

A. Yes, we have had several discussions on the signing of the agreement.

Q. Did you have a conversation with Mr. Thomas Rotel some time in December or the early part of January, 1945?

A. Shortly after Christmas, I don't recollect whether it was on the 27th or 28th; I contacted Mr. Rotel and advised him that I had been retained by Mr. Graham to act as Labor Relations man for his shipyard, and that I would like to know all the necessary things pertaining to the Metal Trades agreement that was in operation in the area.

Q. I see. And you spoke with him over the telephone, did you? A. Yes, I did.

Q. And what was said with respect to an agreement by Mr. Rotel or by you?

A. Well, I believe Mr. Rotel at that time said that that was quite tentative and that perhaps we had better wait until things were actually under way and the yard was a physical actuality.

Q. Well, had Mr. Graham purchased, or taken possession of the yard at the time you talked with Mr. Rotel? [290]

A. Well, of course, I didn't know about Mr. Graham's financial arrangements in New York, because all I had to do was labor relations.

Q. No; did you know if he had taken possession, whether operating?

(Testimony of Raymond H. Lehaney.)

A. No. Oh, yes, he had taken possession of the yard, I think, but if you mean if there was work on the boats at that time, or anything, no. I believe two or three retainers there.

Q. No work on the boats?

Trial Examiner Myers: What do you mean by "retainers?"

The Witness: I mean certain people left over from the previous yard, the Judson Pacific Yard, where Mr. Johnson was, who were kept on at that time. Mr. Jim Close was one of them, and Nick Curzon, and Richards, I believe.

Q. (By Mr. Janigian): On January 2, 1945, did you have a conversation with Mr. Thomas Rotel and Mr. A. T. Wynn of the Bay Cities Metal Trades Council?

A. Yes, I did.

Q. Where was the conversation held?

A. At the Metal Trades Council at the Labor Council.

Q. In San Francisco? A. That is right.

Q. And what was said by either Mr. Rotel or Mr. Wynn?

A. We discussed the various clauses in the contracts, etc., and Mr. Rotel and Mr. Wynn pointed out to me that the contract [291] was exactly similar to the contracts established by the A. F. of L. in all the other yards in the area and that it was the standard Metal Trades agreement, to which would be attached the supplemental agreement covering ship repair as differentiated from ship con-

(Testimony of Raymond H. Lehaney.)

struction. At that time Mr. Rotel said that the standard contract forms were not available as they were at the printer's, but he had the small grey-backed books.

Q. Did he show you the small grey-backed book?

A. Yes, he did; he gave me several.

Q. He gave you several?

Q. I now show you Council's Exhibit No. 4 and ask you if that was the book that Mr. Rotel showed you?

A. That is the book.

Q. You say he gave you several copies?

A. Yes, he did.

Q. At the time did you sign any agreement?

A. Yes; we discussed the thing quite fully and we signed an agreement on a piece of paper such as this, to which this book was attached.

Trial Examiner Myers: Wait a minute. Which booklet did he show you? Was it Council's No. 4 or Council's No. 1?

Mr. Janigian: Excuse me; that is right. It is No. 1.

The Witness: Yes. [292]

Mr. Janigian: Council's Exhibit No. 4 is the new construction.

Q. Now I show you Respondent's Exhibit No. 1 and ask you if you recognize that document?

A. Yes.

Q. Tell us what it is will you?

A. This is the document that I signed; that is my signature on the thing. That is from the Graham Ship Repair and I signed it in the office of the Metal Trades Council.

(Testimony of Raymond H. Lehaney.)

Q. Did you receive a duplicate original of this Respondent's No. 1? I mean, did you have another one like this?

A. I asked him for copies; we had three extra copies of it.

Q. Did you have a signed copy for your files?

A. Yes. In fact, we had I think four signed all together, one for their files, and I think we had two for our files.

Q. You had two for your files; was there attached to it, or to the copies you had, a copy of Council's Exhibit No. 1 which is the small booklet?

A. That is right, the grey-backed booklet.

Q. Prior to signing Respondent's Exhibit No. 1 had you discussed with Mr. Graham the advisability of signing an agreement with the Bay Cities Metal Trades Council?

A. Yes, I pointed out to him that in order to operate in the territory that an agreement covering what was embodied [293] in this grey-backed booklet would have to be gone into, and on account of that fact Mr. Graham and I came over to San Francisco because I wanted him also to meet with the Council and give his version of our relationship.

Q. But prior to signing Respondent's Exhibit No. 1, the first agreement, had you discussed with Mr. Graham the advisability of signing such an agreement?

A. Yes.

Q. What discussion did you have with him on that subject?

(Testimony of Raymond H. Lehaney.)

A. Well, we discussed the A. F. of L. agreement and the way in which the mode of operations in the Bay Area was handled, and I specifically brought out the fact to Mr. Rotell the fact that in talking to him before he had advised me that the Metal Trades agreement was a closed-shop agreement which at the time included every craft in the A. F. of L.

Q. What had Mr. Graham told you with respect to any agreement as to whether or not you were to sign any such agreement prior to January 2d?

A. Oh, I think Mr. Graham will agree that he gave me full authority to sign on all agreements. As a matter of fact in Los Angeles in December when I was first hired there that was one of the specific questions I asked Mr. Graham, as to whether or not I would have full authority to sign and act as Labor Relations Director, because otherwise I couldn't take the job. Mr. Graham, in the presence of another witness, [294] Mr. Tuohy, who was with me at that time, told me I would absolutely have authority to sign; that it was not his habit in handling men to interfere with delegated authority that he had given out.

Trial Examiner Myers: Are you still in the employ of Graham Ship Repair?

The Witness: Yes. The agreement that I had with Mr. Graham was a very flexible agreement, a verbal agreement between the two of us because of that fact that I was not, or that I did not wish to leave my employment down there with the West-

(Testimony of Raymond H. Lehaney.)

ern Conference. Mr. Graham said, "Whenever I need you here you will be here, and otherwise you will be on your own time," so I have never been advised by Mr. Graham to the contrary.

Q. (By Mr. Janigian) Now, Mr. Lehaney, you mentioned a meeting on January 4th; this meeting was held——

Trial Examiner Myers: He didn't mention a meeting in January.

The Witness: I mentioned January 2d.

Mr. Janigian: I believe he mentioned it. Anyway, let it go.

Q. (By Mr. Janigian) You made mention of the fact, I believe, that you wanted to have Mr. Graham meet the boys, or words to that effect. Was there a subsequent meeting at the office of the Bay Cities Metal Trades Council? [295]

A. Yes. There were certain questions asked me by the Metal Trades Council pertaining to operation and ownership, etc., which I was unable to answer because I was not entirely familiar with Mr. Graham's financial arrangement regarding the yard. Therefore, I thought it would be necessary for him to be over there with me. Also to acquaint the gentlemen of the Metal Trades Council with the fact that I had full authority to act, etc., and in order to keep our relations harmonious.

Q. Was there such a meeting held?

A. Yes; the entire Metal Trades Council met upstairs, as I understand, and Mr. Graham and I waited in the office while the meeting went on. It

(Testimony of Raymond H. Lehaney.)

consumed some hours of time I believe, and then Mr. Rotel informed us that a sub-committee had been set up from the big meeting to meet with us in the library downstairs. So Mr. Graham and I went down stairs and met with,—well, I don't know the names of the gentlemen we met with now,—but I would say there were seven or eight and they identified themselves as International men.

Q. I see. What was discussed at this meeting?

A. The contract was discussed. Mr. Graham was asked certain questions about the operations and management, etc., of the plant and when we intended to get going, and how many machinists he would need, and whether or not the A. F. of L could supply the machinists that they stated they insisted [296] on in the contract.

Mr. Sapiro: Pardon me, will you repeat that?

Trial Examiner Myers: Will the Reporter read the question?

(The question was read by the Reporter.)

Q. (By Mr. Janigian) What did Mr. Graham say as to the number of machinists he would need?

A. I think he said at the time he would need about thirty machinists and ultimately, when the yard built up, around eighty machinists.

Q. What did the A. F. of L. representative say they could or could not supply? Did they say they could or could not supply the number of machinists?

A. Well, there was a gentleman there from the Machinists' Union—I can't think of his name; oh,

(Testimony of Raymond H. Lehaney.)

yes, a Mr. Truax—Mr. Truax, and he stated that they could supply the A. F. of L. machinists and that they would immediately start sending them to the yard, but he could not get the entire amount within the time, within the next day or two; that it would probably take a little longer.

Q. I asked you, Mr. Lehaney, whether or not you advised Mr. Graham subsequent to your discussion of Respondent's Exhibit No. 1 that you had signed such an agreement.

A. Mr. Janigian, your "Respondent's No. 1" is somewhat confusing in my mind. [297]

Q. This document which I showed you; the first that was signed on January 2. Did you advise Mr. Graham that you signed this?

A. Yes; Mr. Graham knew that I signed it.

Q. Did you tell him?

A. Sure, and I brought over the grey-backed book, such as this. I had been given about eight or nine by Mr. Rotel.

Q. Did you give Mr. Graham copies of the grey-backed book?

A. Yes. He had a copy; also to Nick Curzon, the foreman over there; also gave a copy to Jim Close, and there was one other copy which I gave to Mr. Bates.

Q. Did you give to Mr. Graham a copy of this document which is Respondent's Exhibit No. 1?

A. No, because at that time that was the only one there was outside of the one for our files and

(Testimony of Raymond H. Lehaney.)

the one the Metal Trades Council had. That is all there was.

Q. But you did have one for your files?

A. That is right.

Q. Did you carry it with you, or was it among the records of the Graham Ship Repair Company?

A. I had it over in the yard.

Trial Examiner Myers: Whereabouts in the yard?

The Witness: I gave it to the bookkeeper, Mr. Bates, for the files.

Q. (By Mr. Janigian) I see. Now following this meeting [298] of January 4th—

Mr. Sapiro: (interposing) He didn't say it was January 4th.

Q. (By Mr. Janigian) When was the second meeting?

A. On January 4th; the meeting of which I spoke as meeting upstairs and the sub-committee meeting downstairs.

Q. That is the meeting we had in mind. Following the second meeting were any A. F. of L. machinists despatched to the yard, do you know?

A. Well, I myself didn't know that any were despatched to the yard at that time, although I had gotten into altercations with Mr. Rotel when he informed me that three or four machinists had been sent to the yard and refused employment, and I checked at the yard and couldn't find anybody over there that would say they had sent them away. At that time I called Mr. Rotel back and

(Testimony of Raymond H. Lehaney.)

we had a few heated words concerning it. The incident happened again with two other men, and then Mr. Truax came to talk to me and said that he wondered why I wouldn't take the men on. I said that I had seen no men.

Q. Mr. Lehaney, did you have a conversation with Mr. Close on this subject?

A. Yes, Mr. Close said he had not seen the men either.

Q. I see. Following this meeting of January 4, did you discuss with Mr. Graham the advisability of signing a separate [299] agreement with Local 1304 CIO Machinists' Union represented by Mr. Smith?

A. I don't believe we discussed the advisability; I think the matter came up and we talked about it, and I advised Mr. Graham that I had already signed the contract as he had authorized me to do with the A. F. of L. and, therefore, he couldn't also enter into negotiations with the CIO.

Trial Examiner Myers: What did Mr. Graham say about it?

The Witness: Mr. Graham at that time said, "Well, I guess you know what is best in these things; the only thing I am concerned with is that we get along harmoniously and get the work in and out of the yard, and get it done, because I have my investment tied up." He wanted to get it along, and we left it at that.

Q. (By Mr. Janigian) Did you or Mr. Gra-

(Testimony of Raymond H. Lehaney.)

ham authorize Mr. Close to sign a separate agreement with Local 1304?

A. No, I don't believe Mr. Graham did.

Q. Did you authorize Mr. Graham to sign such an agreement?

A. No; as a matter of fact, I told Mr. Close that if he were going to sign such an agreement he could go ahead and sign it, but I wouldn't sign it.

Q. Well, were you still the Industrial Relations Director at the time you made that statement?

A. Labor Relations.

Q. Or Labor Relations? [300]

A. Absolutely.

Trial Examiner Myers: You still are?

The Witness: I still am, as far as I know.

Q. (By Mr. Janigian) Mr. Lehaney, I show you Council's Exhibit No. 2 and ask you to look at it and tell me if you signed the original of that document.

A. That is the document; that is my signature.

Q. You signed that document when?

A. We signed that, I think it would be somewhere between the tenth and twelfth of January. I am not quite sure of the date.

Q. I see.

Trial Examiner Myers: That is Council's Exhibit No. 2, is that it?

Mr. Janigian: Yes.

Q. (By Mr. Janigian) During the month of January did you ever have any conversations with

(Testimony of Raymond H. Lehaney.)

Mr. James Smith, Business Representative of the CIO Machinists' Union?

A. Yes; I had two or three telephone conversations with Mr. Smith and met Mr. Smith in a meeting in the Graham Ship Yard with Mr. Graham present, Mr. Fogel,—F-o-g-e-l, I believe it is—and Mr. Close.

Trial Examiner Myers: Was Mr. Johnson there?

The Witness: Mr. Johnson, right.

Q. (By Mr. Janigian) About when was this meeting held? [301]

A. Well, I would say that it would be about the 22d or 23d of January.

Q. And what was discussed at this meeting, do you know?

A. Yes; at this meeting—

Trial Examiner Myers: (interposing) That would be January 16th. I think that is the date most of the witnesses testified to.

The Witness: Yes.

Q. (By Mr. Janigian) What was discussed at that meeting? What was said by Mr. Smith and what was said by you and the others? Can you tell us that?

A. Yes. Mr. Smith and Mr. Graham talked briefly in there. I don't know what they said. Mr. Graham, Mr. Fogel and myself talked over at the tool shed together where we had the meeting and we were going to attempt to iron out the situation by pointing out to Mr. Smith that we had already

(Testimony of Raymond H. Lehaney.)

signed the A. F. of L. agreement. Mr. Smith said, "That is nothing but a backdoor agreement." I characterized his remark as a "lie". Mr. Smith then said—and I don't quote him verbatim as I don't remember exactly, but it was to this effect: "That by God the CIO Machinists were going to come in and work in that yard; that they were in all other yards around there and this yard wasn't going to be any different; that if they didn't there would be a picket line in the morning around the Graham Ship Repair Yard." [302]

Q. Did you say anything to that?

A. Yes, I told Mr. Smith to put the picket line on the yard.

Q. Did you have a conversation with Mr. Graham on or about the 25th day of January, 1945?

A. Well, Mr. Graham and I had many conversations during the time.

Trial Examiner Myers: This day is when there were a lot of machinists, and some were hired and some weren't.

Mr. Janigian: They were A. F. of L.

Q. (By Mr. Janigian) The day the A. F. of L. machinists reported?

A. There were CIO machinists in the yard that morning. Mr. Graham and I had been hot on the trail of the Richmond Lodge of Machinists, A. F. of L. and wanted more men, and we thought that we wanted even more men than they could supply at that time; all the men he could possibly shove into the yard, to the extent of putting continual

(Testimony of Raymond H. Lehaney.)

pressure on. That morning Mr. Graham suggested that we go out and count the cards around the time punch out there. We collected the cards and counted them and we found that there were—wait a minute; let me go back a little. We were hollering about the absenteeism among the A. F. of L. machinists in the yard; that is what we were hollering about, and we went out and counted the cards and found there were some thirty-two or [303] thirty-three machinists in total in the yard. We brought the cards back in and I got on the 'phone and called the Machinists' Union and three of their representatives immediately came down.

Mr. Royster: Specify what they were.

The Witness: A. F. of L. of Richmond, and three of their representatives came down. One of the things we said was this absenteeism, this absentee condition couldn't possibly continue because the yard couldn't stand this kind of thing when we need machinists. So they started to go through the cards, and fourteen of the machinists were found to be CIO machinists from Mr. Smith's local. Mr. Smith had called me on the telephone and he said——

Q. (By Mr. Janigian) (interposing) When did he call you? A. I believe that very day.

Q. On the 25th?

A. Approximately, I am not sure of the day; it could have been the 24th. He said that he had been waiting a long time and he was pretty tired of our temporizing and stalling tactics, etc., and

(Testimony of Raymond H. Lehaney.)

unless something was going to be done, some action was going to be taken. I told him at that time we had A. F. of L. machinists coming into the yard.

Q. What did he say?

A. He said, "I'll come down and pull the machinists right out of there." [304]

Q. Did Smith call up the Yard then following that statement?

A. Yes, Mr. Smith subsequently came down—I don't know how soon—and took the machinists, the CIO men out of the Yard.

Q. Did the CIO machinists come back to work subsequently to that time, do you know?

A. That I couldn't say; I don't recollect.

Q. Now was there a picket line placed?

A. No, there was no picket line placed.

Q. Now from that time on, were the machinists that were cleared to that Yard from the A. F. of L. Machinists' Union 284?

A. Correct. One machinist put on as Leaderman originated out of Local 68 and cleared through Richmond Lodge. The name was Renner, I believe.

Q. Now at this first meeting that you had with Mr. Smith, did he say anything to you with respect to an agreement he wanted Graham Ship Repair Company to sign with Lodge 1304?

A. You are talking about the first meeting I had with Mr. Smith?

Q. Yes.

A. Well, at that time Mr. Smith was very nice;

(Testimony of Raymond H. Lehaney.)

he came down and said as the Yard was starting up he wanted to know if we were going to continue with CIO as Johnson had previously, [305] and I said at that time—this was either the second of January, or the third, or right close to there—that the Yard was barely going, and at that time Mr. Smith said he would call back again and contact us again, etc.

Trial Examiner Myers: What did you tell him?

The Witness: We told Mr. Smith at that time that we would make up our minds and call him back within the next day or two.

Q. (By Mr. Janigian) That was January 3d?

A. About the third. It was previously to the meeting that Mr. Graham and I had had with the Metal Trades Council.

Q. Did you have any further conversation with Mr. Smith with respect to any agreement which he wished to have you sign with Lodge 1304?

A. Only that Mr. Smith on the telephone said, —I don't believe I saw him again outside of the time in the tool shed, but I talked to him over the 'phone and only to the extent that he insisted on the signing of the CIO agreement for the covering of the machinists in the Yard.

Q. When was the last time Mr. Smith talked to you on the subject of signing the CIO agreement?

A. I'd say probably around January 25th or 26th, at which time Mr. Smith pointed out that a portion of our work had to go to the other Yards where the CIO machinists were and that when that

(Testimony of Raymond H. Lehaney.)

work got over there there would be a lot of trouble [306] about it.

Trial Examiner Myers: What did you tell Mr. Smith during that telephone conversation?

The Witness: I told Mr. Smith, previous to that time, that we had already informed them we had signed a complete A. F. of L. agreement and already removed his men.

Trial Examiner Myers: You had a couple of telephone calls you said with Mr. Smith.

The Witness: That is right.

Trial Examiner Myers: Before this meeting of January 16th?

The Witness: Yes. Let's see, we had telephone calls from Mr. Smith, I would say, continually, at intermittent intervals.

Trial Examiner Myers: About the agreement that he wanted you to enter into?

The Witness: Yes. His story always was the same; he wished us to sign the agreement regardless. He characterized the A. F. of L. agreement as a back-door agreement.

Trial Examiner Myers: What did you tell him?

The Witness: We told—

Trial Examiner Myers: Who are "we"?

The Witness: I told him—I will clarify that—that we had signed a closed-shop agreement with the A. F. of L. covering all crafts with the A. F. of L. Metal Trades Council. [307]

Trial Examiner Myers: Anything else?

(Testimony of Raymond H. Lehaney.)

The Witness: That is all. Mr. Smith and I were very short and snappy over the 'phone.

Trial Examiner Myers: Did you tell him you wouldn't sign any agreement with him?

The Witness: I continued to tell him we couldn't because we would be placed in the paradoxical position of having signed a closed-shop agreement with one and attempting to negotiate an agreement with a dual Union.

Q. (By Mr. Janigian) Mr. Lehaney, prior to January 26th did you discuss with Mr. Graham the advisability, or did Mr. Graham discuss with you the advisability of signing a separate agreement with Mr. Smith's Oakland Union?

A. I believe the matter was brought up, yes.

Q. What did Mr. Graham say on the subject?

A. Mr. Graham was very worried that the machinists that the A. F. of L. was supplying wasn't sufficient to enable him to keep the work going that he expected to be in the Yard, and he wondered if we couldn't call up the Metal Trades Council and ask them to make a concession to us, meaning the Graham Ship Repair Company to abrogate the machinists into the agreement with the A. F. of L. in order to bring the CIO machinists into the Yard.

Q. And did you take up that request with the A. F. of L. Metal Trades Council? [308]

A. Yes, I did call Mr. Wynn one time and talked to him and referred him to Mr. Rotel who wasn't in at the time I called, but subsequently

(Testimony of Raymond H. Lehaney.)

around eleven or twelve o'clock at night he called me and I gave him the message and he said, "We'll be perfectly willing; we don't want to be unreasonable; if Mr. Graham wanted to come and meet with the Metal Trades Council and explain everything, or if there was anything in the contract that in any way he felt should be abrogated and state his reasons the Council would be glad to listen to him.

Q. Mr. Lehaney, do you recall the meeting that was held on the second floor of the San Francisco Labor Temple on January 25th, in the afternoon of January 25th, at which meeting I was present?

A. Yes.

Q. Do you know what was discussed at that meeting?

A. At that meeting it was discussed whether or not the A. F. of L. would relent in its position on the machinists and the C.I.O. machinists and allow the C.I.O. machinists to come in. Mr. Graham was asked if there were any reasons he could bring forth that would enable the A. F. of L. to consider such a proposal, and he advanced his reasons and arguments at that time, and——

Trial Examiner Myers: (Interposing): What were they?

The Witness: Well, they were that he didn't feel that we were getting enough machinists to take care of the work, [309] and secondly, on the other hand, the quality of machinists he declared in his estimation was inferior to the C.I.O., and there seemed to be, because of some reason or other that

(Testimony of Raymond H. Lehaney.)

he couldn't put his finger on, a dearth of work to come into the yard after the ships that were presently in the yard had been sent on their way.

If I may digress, I may add that at that time the ships, the day before and that day, had all gone out of the yard. At that time I believe there were only two tugs left in the yard, the Sombrero Key and Petit Menen.

Trial Examiner Myers: What did the A. F. of L. say?

The Witness: The A. F. of L. reiterated the position they had indicated first and pointed out to Mr. Graham that in the meeting of January 2d the point was brought up about the machinists and that it was covering the entire A. F. of L. crafts working in the yard, and they felt the reasons he advanced at that time—at the time of the meeting I am talking about now—were not of sufficient depth or character to enable them to abrogate an agreement that had been signed in good faith.

Trial Examiner Myers: Did they say anything about what would happen if Mr. Graham didn't get rid of the CIO machinists?

The Witness: What do you mean "get rid of the CIO machinists"? [310]

Trial Examiner Myers: He had some C.I.O. machinists.

The Witness: Not at that time I don't think we had any C.I.O. machinists; only A. F. of L. then.

Q. (By Mr. Janigian): Well, Mr. Lehaney, on the subject of supplying a sufficient number of ma-

(Testimony of Raymond H. Lehaney.)

chinists, what was said by the representative of the machinists' union as to whether or not they had been able to supply the yard with a sufficient number?

A. The machinists at that meeting stated they could supply any number up to a hundred and twenty, and pointed out that they had been building up the number of machinists that had come into the yard and would continue to do so, but the point that got to be the main motive of the meeting was the idea as to why the ships weren't going into the Graham Ship Repair Yard.

Trial Examiner Myers: You are sure that this meeting took place on January 25th?

The Witness: Yes, it did.

Q. (By Mr. Janigian): At that meeting on January 25th——

A. (Interposing): It might have been the 24th or the 26th, but somewhere in there.

Trial Examiner Myers: The change of machinists at the plant on the 25th was more or less agreed upon in the record; that is why I am fixing the date.

The Witness: Yes, I think it was about the 25th.

Q. (By Mr. Janigian): I have in mind the meeting at which I was present and which was held on the 25th day of January.

A. The only meeting at which we were both present to my knowledge, Mr. Janigian, was that meeting.

Q. January 25th, and at that time was any discussion had with respect to the demands that were

(Testimony of Raymond H. Lehaney.)

served upon the Graham Ship Repair Company by Mr. Smith?

A. Yes, Mr. Graham brought out the fact that Mr. Smith had been calling him and talking to him and telling him that unless the C.I.O. machinists were in the yard, or got back into the yard that no repairs would be done in the area.

Q. I see. Was there any discussion at that meeting of a separate agreement to be signed with Local 1304?

A. Yes, it was brought up and mentioned to the A. F. of L. but the A. F. of L. said they did not see it at the time, that there was any reason good or deep enough to abrogate the agreement.

Q. Now you mentioned that Mr. Smith had told you on or about the 25th of January that he was coming down to pull his men, his machinists.

A. That was before that, Mr. Janigian, because at the time of our meeting there where you were and where I was, at that time there was nothing in the yard but A. F. of L. men. The pulling must have been done prior to that time, because at that time, as a matter of fact, we were laying off men in the [312] yard because we had but the two boats left in there after the work was done; the day before there were four or five boats that went out the one day and there was no other work promised in the yard, and Mr. Graham felt that was due to the fact that probably some influence was being wielded by the C.I.O.

Mr. Stimmel: I object to that.

(Testimony of Raymond H. Lehaney.)

Trial Examiner Myers: Did Mr. Graham say it?

The Witness: Yes, and I think he said that he felt that unless the A. F. of L. relented in its position it would put him in the spot of losing his investment in the yard and all he had worked to build up over there.

Mr. Janigian: I think that is all.

Trial Examiner Myers: Any questions, Mr. Stimmel?

Mr. Stimmel: Yes, I would like to ask the gentleman a few questions.

Cross Examination

Q. (By Mr. Stimmel): Mr. Lehaney, when you first arrived in San Francisco did you investigate the situation in the Estuary District with regard to the labor relations possibility for that yard? That is, the relation of machinists to those yards and the Master Contracts of the A. F. of L. as it affected those several yards on the Estuary?

A. Yes, I did.

Q. Did you advise Mr. Graham with regard to that situation and the possibility that he might be called upon to adhere to [313] the custom that prevailed in that district? That is, sign a contract with the A. F. of L. with regard to all crafts except machinists and go along with the C.I.O. on a new contract?

A. No, I didn't. Could I have the question again?

Trial Examiner Myers: Will the reporter please read the question?

(Testimony of Raymond H. Lehaney.)

(The last question was read by the reporter.)

The Witness: I talked to a few of my own people. By "my own people" I mean the Teamsters and Warehousemen in this area. I also talked to Mr. Rotel who at the time informed me that this was a brand new yard starting up, the Graham Ship Repair, that it came under a different classification entirely than the yards already established around the place; that undoubtedly there would be no new yards start up after that time, and that yard was the only yard of that character that would remain in the Estuary at that time, and that the A. F. of L. felt called upon in this regard to insist upon its closed-shop agreement, as was specified in the Metal Trades agreement covered by this blue booklet here (referring to booklet entitled "Ship Repair Agreement") with the supplemental Ship Repair Agreement, as had been agreed upon in Portland.

Q. Did you discuss the situation with Mr. Graham before January 2d?

A. Yes, I did. As a matter of fact, Mr. Graham and I [314] after discussing it—Mr. Graham at that time agreed with me—went down and boarded one of the landing boats in there, and went up on the forecastle and met with Mr. Close who was up there at the time. Mr. Close, Mr. Graham and I talked for a while, and Mr. Graham asked me to excuse him and he and Mr. Close talked together, and then we went down the stairs. On the way back up he

(Testimony of Raymond H. Lehaney.)

told me Mr. Close felt we should have the C.I.O. machinists in there.

I might add, briefly, that when I first came to the yard Mr. Graham had told me that Mr. Close and Mr. Johnson handled quite a bit of personnel of the yard and that I might contact a little antagonism because I had full charge of the labor relations in the yard, but that was not to worry me.

Q. (By Mr. Stimmel): At the time the discussion took place did Mr. Graham instruct you to sign a contract with both the C.I.O. and the A. F. of L.?

A. No, he absolutely didn't. As a matter of fact, Mr. Graham told me that I had full authority and that he would be guided by my advice in the matter, what I thought best for the yard.

Q. Did Mr. Close at any time contact you and state to you that Mr. Graham had instructed him to sign with C.I.O. and checking his authority to do so?

A. No. I was never conscious of the fact that Mr. Graham had stepped over my head in that matter at all. This is the [315] first time I ever heard of it.

Q. When did you tell Mr. Close that if there was a C.I.O. contract to be signed he could sign it but you wouldn't?

A. I might say that was somewhere between probably January 20th and the 25th, that week.

Q. Did you at any time show the contract to Mr. Graham that you signed, or this preliminary agreement, we'll say? That is, before you signed it?

A. Yes, Mr. Graham was familiar with it, and

(Testimony of Raymond H. Lehaney.)

not only this contract but the separate contract we discussed, that we executed and signed; I signed it while Mr. Graham was standing there with the warehousemen and the teamsters, to cover the warehousemen and the teamsters in the yard. At that time Mr. Graham said to me, "Do you want to sign it or shall I"? I said, "Well, if you want to, it is allright with me." He said, "You signed this, so you might as well sign this."

Q. That is different?

A. Supplemental to this; it covers the teamsters and warehousemen who are not covered under this agreement, and I merely stated this to show that Mr. Graham had delegated the authority to me and was familiar with the contracts.

Q. Did you before signing that document——

Trial Examiner Myers: (Interposing): What document are you referring to, the one dated January 2d?

Mr. Stimmel: Yes. [316]

Q. (By Mr. Stimmel): Did you before signing that document show it to Mr. Graham or discuss the contents with him?

A. Yes, I did. I discussed the contents with Mr. Graham and he told me I had full authority to go ahead, whatever I thought in the matter. I told him it was a regular standard contract enforced by the Metal Trades Council in all the shipyards in the area.

Mr. Royster: Let the record show as to what document the witness is referring.

(Testimony of Raymond H. Lehaney.)

Trial Examiner Myers: Respondent's Exhibit No. 1.

Q. (By Mr. Stimmel): Did you show to Mr. Graham at the time the document was signed the pamphlets that were supposedly or were attached to it, to this instrument? A. Yes.

Trial Examiner Myers: When did you show it to him?

The Witness: I know that because at the time Mr. Bates, who was the bookkeeper, made up a list for me which I was to submit to the War Labor Board, the War Manpower Commission, on the rates that were to be in effect in the yard, and the rates that Mr. Bates made up for me were not accurate according to the grey book which I had at that time. So I pointed out to Mr. Graham that in the grey book the calling was for such and such a rate, and that Mr. Bates' figure did not agree with that rate at all.

Trial Examiner Myers: When did you show the contracts [317] to Mr. Graham?

The Witness: Mr. Graham saw the contracts when I signed them.

Trial Examiner Myers: Was he there on January 2d?

The Witness: When I signed the agreement?

Trial Examiner Myers: Yes.

The Witness: No, he wasn't.

Trial Examiner Myers: When did you show them to him?

The Witness: I discussed it with him previous

(Testimony of Raymond H. Lehaney.)

to that time and previous to the signing of the contract on the 12th which was to take the place of this one. This came back again. Mr. Graham was fully cognizant of the fact I was signing it and he authorized me to do so.

Trial Examiner Myers: When was the first time that you saw this little grey book, as you call it?

The Witness: On the morning of the second of January at a meeting at nine o'clock with Mr. Rotel. I took this book over across the Bay.

Trial Examiner Myers: That was the first time that you saw it?

The Witness: That is right.

Trial Examiner Myers: Then you didn't discuss it with Mr. Graham prior to January 2d, is that right?

The Witness: That is right.

Q. (By Mr. Stimmel): Did you read the contents of the [318] pamphlet before you signed it?

A. Entirely?

Q. Yes. A. No, I didn't.

Q. Did you know what was in it?

A. Yes, I did.

Q. How did you know what was in it if you had never read it?

A. First of all, I had been advised by a teamster returning as to the full contents in the matter, consulted with our warehousemen and teamsters who are known as signatories, but supplemental to the Master Agreement up in the area as to the quirks and kinks in it.

(Testimony of Raymond H. Lehaney.)

Q. How did you know that was the document you discussed with your attorney?

A. If I disagree with what my attorney told me I either call him a "liar" or get a new attorney.

Q. There could be a mistake.

Mr. Janigian: Now he is arguing with the witness. I object.

Trial Examiner Myers: I will sustain it.

Q. (By Mr. Stimmel): Mr. Lehaney, on what date were you last at the shipyard?

A. I was over at the shipyard about February 14th.

Q. What date were you there previously?

A. I had been there probably around the 6th, or the 8th. [319]

Q. You hadn't been there between the 8th and the 25th of January?

A. I am a little confused. I wonder if you could state it again.

Q. When were you last at the Graham shipyard? A. February 14th.

Q. What date previous to February 14th were you at the shipyard? A. I beg your pardon?

Q. What date previous to that were you at the shipyard?

A. Approximately around the 6th or 7th or 8th, around there somewhere.

Q. Were you at the shipyard on January 25th?

A. Yes. That was the date of the meeting in San Francisco. As a matter of fact, I had lunch

(Testimony of Raymond H. Lehaney.)

that day with the plant manager; came over with him.

Q. Well, on that date, did you instruct Mr. Close to the effect that if the machinists, C.I.O., were not discontinued that there would be a strike?

A. At that time I don't think I was talking to Mr. Close.

Q. You didn't have any conversation with him on that date?

A. No, Mr. Close didn't talk to me over there after the first period of our talking back and forth other than to say "good morning" and "good evening."

Q. Did you have a conversation on that day with Mr. [320] Graham?

A. Yes, I talked with Mr. Graham very many times.

Q. Did you discuss the matter of the C.I.O. machinists being in the yard at that time?

A. At that time to my knowledge the C.I.O. machinists were not in the yard.

Trial Examiner Myers: You have your dates a little mixed; they were in the yard on the 25th according to the testimony.

The Witness: I don't think they were, Mr. Examiner; I don't think so.

Q. (By Mr. Stimmel): Didn't you know, Mr. Lehaney, only C.I.O. machinists were hired up until the 25th of January by the Graham Ship Repair?

A. So far as that is concerned, if they were they were hired either by Mr. Close or Mr. Graham be-

(Testimony of Raymond H. Lehaney.)

hind my back and I had no knowledge they were. I thought the A. F. of L. machinists were brought into the yard and if they weren't I am surprised to hear it.

Q. Mr. Lehaney, about the 12th of January did you advise Mr. Close that unless a C.I.O. contract was produced and shown to you by the 15th that you would have to sign a contract with the A. F. of L. on the 15th?

A. I would say that was incompetent, irrelevant and immaterial, because I certainly could not have said any such [321] thing.

Q. I am asking you the question.

A. That would be my answer, Mr. Stimmel.

Trial Examiner Myers: You mean you didn't tell him that?

The Witness: I think it is ridiculous to answer.

Trial Examiner Myers: Did you say it? We want to get along.

The Witness: No, absolutely. If I wanted to go through that I'd sign the C.I.O. agreement to begin with.

Mr. Stimmel: That is all.

Trial Examiner Myers: Any questions, Mr. Royster?

Mr. Royster: No.

Trial Examiner Myers: Any questions Mr.

Mr. Sapiro: Yes.

(Testimony of Raymond H. Lehaney.)

Cross Examination

Q. (By Mr. Sapiro): Do you know how Mr. Graham came to contact you in December of 1944 in Los Angeles?

A. Do I know how?

Q. Yes. How did that come about?

A. Through a mutual friend of ours.

Q. Who was the friend?

A. Should I answer that? Should I involve a man not involved in this?

Mr. Janigian: I object to the question as being incompetent, irrelevant and immaterial.

Trial Examiner Myers: I will sustain it.

Q. (By Mr. Sapiro): Now did Mr. Graham ever tell you to investigate conditions of labor in the Bay Area and report to him as to Union affiliations of these various crafts?

A. No, sir.

Q. So you made no report to him about that, of course?

A. No, not "of course," Mr. Sapiro, because we discussed the matter after I had made my own investigation.

Q. Did your investigation show that in all the Ship Repair Yards in Alameda County that there were separate contracts for machinists with the C.I.O. organization?

A. Yes, I found in my investigation that there was a decision handed down called the "Rosenshine Decision" I believe, which specifically mentioned five certain yards, maybe six, but I believe five. That was called the "Rosenshine Decision" and gave to the C.I.O. the jurisdiction in those specified

(Testimony of Raymond H. Lehaney.)

yards. My attorney informed me that the new shipyard going in there was a completely different arrangement than any held in the Bay Area before.

Trial Examiner Myers: When you refer to your attorney do you mean some friend of yours?

The Witness: No, I mean the official attorney for the Teamsters' International. [323]

Q. (By Mr. Sapiro): Judson had a contract for C.I.O. machinists?

A. Yes, I knew that and my investigation showed me that.

Q. I asked you whether you knew that.

A. Yes.

Q. That is the answer I asked you for.

Mr. Janigian: He has a right to explain it.

Trial Examiner Myers: Gentlemen, gentlemen.

The Witness: I want to show that I did make the investigation.

Trial Examiner Myers: All right.

The Witness: I found this to be the case: First of all, the Judson Yard under Mr. Johnson was doing a different type of work than Mr. Graham intended to do, which was repair work. I found out also that in back of the Judson Yard was a whole seventeen months or more of terrific labor trouble in the yard between the previous commitments and between the A. F. of L. Metal Trades and the C.I.O. and it was to Mr. Graham's interest to avoid that difficulty.

Q. (By Mr. Sapiro): I think you were present at the time Mr. Johnson was there at the meetings?

(Testimony of Raymond H. Lehaney.)

A. Are you referring to the meeting in the tool shed?

Q. Yes. A. Yes.

Q. Did you hear Mr. Johnson say that he thought it would be a good idea to sign up with the C.I.O. local; that they had gotten along very well with the C.I.O.?

A. Mr. Johnson made that statement, substantially. I think he said that he believed that Mr. Graham should sign with the C.I.O. because he had always gotten along with Mr. Smith and that Mr. Smith and he had had very amicable relations as far as the C.I.O. was concerned and he thought very highly of Mr. Smith.

Q. Now can you give us the date, that is the first time you ever saw Mr. Smith personally face to face?

A. I think it was around, well, just about the first or second day over in the yard.

Trial Examiner Myers: You mean after the first of the year?

The Witness: Yes.

Q. (By Mr. Sapiro): When did you open the yard?

A. We opened the yard on the first. Mr. Graham had already [325] been in the yard prior to that time; I believe two or three days.

Q. How many men were working in the yard on the first?

A. Approximately, I'd say, seventeen to twenty men.

(Testimony of Raymond H. Lehaney.)

Q. On the first day of January?

A. That is right.

Q. 1945? A. That is right.

Q. How many machinists were working there at that time?

A. I believe there were three C.I.O. machinists in the yard at the time, which Mr. Graham explained to me he had to carry over due to the manpower conditions imposed upon him; that the men from the Judson Pacific Yard did not clear and he had to keep them on temporarily.

Q. Did he use the word "temporarily"?

A. I think he did, yes.

Q. Did Mr. Graham ever tell you that due to the commitments he had with the Navy he was obligated to rehire all former employees of Judson?

A. No, sir. Mr. Graham explained to me that he had a ceiling put on him at that time; they were beginning with a hundred and forty and that the ceiling would gradually go up as the work came into the yard, and they had to clear and a certain percentage of this had to be the Judson Pacific Yard hold-over until such time as the manpower regulations governing [326] his up-ceiling could be put into effect.

Q. Did he say "hold-over" or "former employees"?

A. I don't know about that. It could have been "former employees."

Trial Examiner Myers: They weren't former employees.

(Testimony of Raymond H. Lehaney.)

The Witness: They were Johnson's men, not former employees of Mr. Graham.

Q. (By Mr. Sapiro): All right. You say that on the morning of the 25th there were thirty machinists' cards in the rack?

A. Yes, maybe thirty-two.

Q. You are quite positive about that?

A. No, I am not positive; between twenty-nine and thirty-two.

Trial Examiner Myers: I think the witness has the dates wrong. According to the book there weren't that many. We have the transcript.

The Witness: Maybe I am off on the date then. I still think that the day we had the meeting we had A. F. of L. machinists in the yard and no C.I.O.

Trial Examiner Myers: That might be true, but not on the 25th.

The Witness: Well, I just am back from Washington where I have had everything thrown at me.

Trial Examiner Myers: I realize that. We have the [327] data from the books and are a little more familiar with it.

Q. Were you present at the meeting at the Labor Council—I think the date was the 16th of January, 1945—in which Mr. Graham was called upon and charges were made that he was hiring C.I.O. machinists in violation of the agreement?

A. I believe he was asked this—if I am correct—if Mr. Close was hiring those men in there, because when we were there Mr. Rotel jumped on me and asked me if I knew whether or not we were in vio-

(Testimony of Raymond H. Lehaney.)

lation of the agreement. I said, "Certainly not," and at that time Mr. Graham had not to my knowledge done any hiring of any machinists over there.

Q. Did Mr. Graham at that time say that that condition would be remedied?

A. What condition?

Q. Hiring of C.I.O. machinists, the charge that was made against him?

A. I didn't know charges were made. It was a question that was brought up and discussed on the floor.

Q. What was said about Graham Ship Repair hiring C.I.O. machinists?

A. I believe Mr. Graham said that to the best of his knowledge there were A. F. of L. men in there.

Q. That is your recollection?

A. That is my recollection, Mr. Sapiro.

Q. You said something about this document going to the [328] War Manpower Commission; what was that document?

A. That was the set of rates you have to set up in order to send it over. Mr. Graham had asked me to make it up to be sure to have it in there. I called Lt. Buckley of the Naval Accounting Department and he told me how to make it up and where to send it.

Q. Was there a question in there as to where you expected to get your employees from, the source of your labor, in that questionnaire, or that document?

(Testimony of Raymond H. Lehaney.)

A. I don't think you understand what it was. It was a preliminary make-up that Mr. Bates, the bookkeeper, had made up of what he thought the rates should be that we should pay to the men in the yard; just for my information on it. I questioned it because it differed from the agreement that we had here.

Trial Examiner Myers: All you know about that was the schedule of rates?

The Witness: That is right, the wage rates.

Q. (By Mr. Sapiro): Did you know that, or do you know now, that Mr. Graham had filed a document with the War Manpower Commission which had these questions in it? A. No, I didn't.

Q. Will you please let me finish the question?

A. I beg your pardon.

Q. He said that he expected to get the machinists from the [329] C.I.O. and all the other crafts from the A. F. of L.? Have you any knowledge of any such document being filed by Mr. Graham?

A. Not to my knowledge. [330]

Trial Examiner Myers: Does anyone want to call any other witnesses or introduce any other evidence or any motions, gentlemen?

Mr. Royster: I have a couple of motions, Mr. Examiner.

My first is to amend the Complaint in certain respects. The Board desires to strike paragraph 10 from the Complaint. Paragraph 10 is the paragraph which alleges that the machinist employees struck on January 25, 1945.

Trial Examiner Myers: You mean C. I. O. machinists?

Mr. Royster: Yes, C.I.O. machinists.

There has been a complete absence of proof that any such strike occurred. For that reason I move we strike it from the Complaint.

Trial Examiner Myers: Any objection?

Mr. Janigian: Yes, I would like to object to the amendment because that paragraph is in conformity with the allegations of the charge to the effect that these employees left [339] by reason of the unfair labor practices.

Trial Examiner Myers: Did I understand your motion is that you want to strike all the allegations in the Complaint with reference to the alleged strike?

Mr. Royster: Yes. I phrased it in the fashion I did, I intended to make a supplemental motion to change the language in paragraphs 9 and 11.

Mr. Janigian: My objection is predicated on the proposition that there is evidence that there was either a strike or a desire on the part of these machinists not to work any longer.

Now, we have Mr. Lehaney's testimony to the effect that Mr. Smith told him that he was going to come down to get his machinists, and we have the testimony of these witnesses who testified that they would not work along with A. F. of L. men, and I think if you consider the evidence by and large on the basis of the testimony given by all of the witnesses, I believe you must conclude that they left, the machinists left their employment and that they

were not fired, they left their employment because A. F. of L. machinists were coming on the next shift.

The Board certainly knew what the circumstances were and what the facts were before it prepared its Complaint, and I do not believe it should be permitted to recede from a position which it deliberately took after two months of investigation. [340]

Trial Examiner Myers: I will grant the motion.

Mr. Royster: That motion being granted, I wish further to move, then, that the second from the last line in paragraph 9 of the Complaint which now reads, starting at the beginning of that line, "Council thereby terminating the employment of all employees." That is paragraph 9, the second to the last line of paragraph 9.

Trial Examiner Myers: What do you mean, on page 4?

Mr. Royster: It is page 5, Mr. Examiner, paragraph 9, near the top of the page. It is the second before the last line, and it starts with the word "Council" capitalized.

I move to amend that line to read "Council and discharged the employees within."

Trial Examiner Myers: Within what?

Mr. Royster: Then it follows into the next line: "The unit described in paragraph III, solely because of their membership in the Union."

Mr. Janigian: Are you striking anything from that?

Mr. Royster: Yes, I am amending it to read in

the fashion I gave you and thus striking the words "thereby terminating employment of all."

Mr. Stimmel: What line is that? What page?

Mr. Royster: That is page 5, fourth line from the top of the page.

Is my motion to amend clear now? [341]

Mr. Janigian: "Council and discharged the employees within the unit."

Mr. Royster: That is right.

Trial Examiner Myers: Any objection?

Mr. Stimmel: We will object to that on the ground that no employees were replaced on the 25th and that the employees failed to show up on the 26th for work and that therefore respondents were forced to call for other men.

Trial Examiner Myers: I will overrule the objection and grant the motion.

Is there any other motion?

Mr. Royster: I have a further motion, Mr. Examiner.

With respect to paragraph 11 of the Complaint, the third line of the paragraph after the word "said," which is the first word in the third line of paragraph 11, I wish to interpolate "discharged" and to strike the words following "Employees who were on strike."

Trial Examiner Myers: I think you had better stop with a lot of quotes and end quotes. Nobody knows what it is. If you want to read a new paragraph in there, it is best to do that. We won't know on the record which words you want stricken.

Mr. Royster: Well, then, I move to strike para-

graph 11 from the Complaint and to substitute therefore the following:

“On or about February 14, and February 18, 1945, and on [342] several occasions thereafter, the Union, acting on behalf of said discharged employees, requested respondents to reinstate said employees to positions held by them on January 25, 1945. Respondents, on said dates, and at all times thereafter, refused to reinstate said employees or any of them to their former or substantially equivalent positions solely because of their membership in the Union.”

Trial Examiner Myers: Any objection?

Mr. Janigian: Yes, I object to this, to all these after-thoughts on the part of the Board's counsel.

Trial Examiner Myers: When I strike the allegations from the Complaint I mean I recommend in my intermediate report that these allegations were not supported because there is no evidence of a strike.

Mr. Janigian: Well, I think you should make a finding if there was or was not a strike. I think we introduced evidence to show that there was a strike; that we have testimony of witnesses, at least one witness, who testified that Mr. Smith said he was coming over to get his men. Mr. Smith went over and got his men. Whether it was technically a strike or cessation of work is one thing; but I do not think Board's counsel should be permitted to patch up a complaint and in effect make a new complaint following the hearing of a case.

Trial Examiner Myers: I will grant the motion. Is there any other motion?

Mr. Royster: The final motion is that all references to paragraph 10 in this complaint be deleted.

Trial Examiner Myers: You do not have any paragraph 10. It has been stricken out.

Mr. Royster: The reason I make that is that in paragraphs 12, 13 and 15, paragraph 10 is mentioned.

Mr. Sapiro: May I suggest that the reference to those will refer to your substituted paragraph 10?

Mr. Royster: There is no substituted 10.

Trial Examiner Myers: What is the motion again?

Mr. Royster: I move that reference to paragraph 10 of this Complaint which has been stricken be deleted from wherever it is mentioned elsewhere in the Complaint.

Trial Examiner Myers: The motion is granted.

Mr. Royster: I have a further motion, Mr. Examiner, to conform the pleadings to the proof.

Mr. Janigian: I object to any such motion. Now, that is a blanket motion. If it has to do with dates and situations, I mean clerical errors or some such thing as that, I have no objection; but if he means to change the substance of the Complaint by throwing in everything that came in by way of evidence, I object to it. I would like to know in what respect he wishes to amend it.

Mr. Royster: I should have been more specific, of course. [344] The usual motion, Mr. Janigian, to conform the pleadings to the proof in matters as names, dates, places, immaterial matters.

Mr. Janigian: Then I have no objection.

Trial Examiner Myers: The motion is granted without objection. That is, you are conforming the pleadings, is that it?

Mr. Royster: The pleadings.

Trial Examiner Myers: The motion was addressed to conform the pleading to the proof with respect to the matters stated by you?

Mr. Royster: Yes, sir.

Trial Examiner Myers: Any other motions, gentlemen?

Mr. Janigian: At this time I would like to make a motion to dismiss on behalf of the Bay Cities Metal Trades Council on the ground that the evidence does not prove violation of any of the provisions of the National Labor Relations Act; that the evidence does not prove that the agreement which was entered into——

Trial Examiner Myers: Are you going into oral argument now?

Mr. Janigian: No, no, just the grounds.

That the evidence also does not show, in fact the evidence affirmatively shows that the agreement entered into between the Council and the employer in this case is valid and that [345] it covers employees which the Board has repeatedly recognized as an appropriate unit, to-wit: all production and maintenance employees in the shipyards.

For those reasons we move to dismiss all of the complaint.

Trial Examiner Myers: I will reserve decision. Any other motions?

Will you proceed with your oral arguments?

ORAL ARGUMENT ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD

Mr. Royster: I shall address myself first, Mr. Examiner, to the question of the appropriate unit for bargaining at the respondent's operation with respect to machinists.

The Board contends that the machinists at the Graham Ship Repair Company constitute an appropriate bargaining unit and as evidence to support that motion the history of bargaining in Alameda County, from 1936 at least, has been on the basis that machinists in ship repair yards without exception given in evidence in this hearing, are represented separately for the purposes of collective bargaining.

Now, the yard which the respondent operates went into operation, I believe, in the month of May, 1943, when Mr. Johnson of the Judson-Pacific War Industries, opened it. During the time that the Judson-Pacific Company operated from May, 1943, until the end of January, 1944, machinists were represented [346] in a separate bargaining unit, and the remainder of the what you might call production and maintenance employees, the hourly-rated workers, were represented in another unit.

The machinists, as the evidence will show, have high skill, their work is of a nature that is performed only by them, they are not called upon to do work other than machinists' work and other craftsmen in the yard are not required to do the work of the machinists.

This question of the propriety of a separate bargaining unit for machinists in the shipyards in the Bay area has been a matter of controversy before and the Rosenshine Award, to which reference has been made in this proceeding, recognized that machinists constitute a separate bargaining unit in ship repair yards. To the same effect is the Board decision in the Bethlehem-Alameda Shipyard, Inc., 53 NLRB 999, which directed a globe election among the machinists whereby they could determine whether or not they desired to be represented for the purposes of collective bargaining in a craft unit or in the overall industrial unit.

The respondent here, the Board argues, was bound to recognize and to deal with Local 1304 as bargaining representative of the machinists at its yard. For these reasons, while it is not argued by the Board that there was such privity between the respondent and Judson-Pacific War Industries as would make it incumbent upon the respondent to carry out the [347] terms of the collective bargaining agreement between Judson and Local 1304, nonetheless the unit of machinists continued.

Three machinists, according to the evidence, had no break in their employment from Judson-Pacific War Industries or Walter W. Johnson, whichever it was to the respondent. Mr. Lehaney testified that other personnel were carried on over. Mr. Close, I believe he mentioned Mr. Richards and there is no other evidence in the record that some few maintenance employes worked right along for

Judson-Pacific or Johnson and were carried right through onto the payroll of the respondent here.

Now, in that situation the bargaining unit established by the workers at the—I will say the predecessor company, not meaning to imply any privity between the two—continues and it becomes the obligation of the new employer to continue the recognition in so far as the bargaining unit is concerned, and also in so far as the bargaining agent is concerned, unless there is reason for that new employer to believe that the affiliation of the men involved has been changed.

Now, in the case here there was no such indication given to Mr. Graham. The Board has recently given a decision of a somewhat similar case, the South Carolina Granite Company, et al., Case No. 10-C-1417, decided October 28, 1944, where it held that an employer who took over a quarry from a prior owner, leased it, was required to deal with and bargaining [348] with the bargaining representative of the employees who were taken over along with the quarry, although there again there was no privity between the new owner and the prior owner which bound the new owner by the contract made by the prior owner.

Now, Mr. Graham said he wanted to bargain with the machinists, with Local 1304 for the machinists here and had Mr. Close call Mr. Smith several times and could not get Mr. Smith to answer. Be that as it may, Mr. Lehaney, it is undisputed, had complete and unreviewable authority from Mr. Graham to handle matters of labor re-

lations, to enter into bargaining contracts, and Mr. Lehaney said that he had no intention of making any contract with Mr. Smith covering the machinists because he already had a contract with Bay Cities Metal Trades Council which precluded him from doing anything of the sort.

Now, as to that contract with the Bay Cities Metal Trades Council, in the first place it did not cover machinists. Machinists are not mentioned in it anywhere nor has it been construed to cover machinists in any operation in the Bay area. The testimony indicates this agreement is the same agreement which is in effect in other yards in the area; machinists in the other yards are represented in Alameda—I will confine my remarks to Alameda—by Local 1304, and the Council does not consider that their agreement has been [349] violated in that respect.

Now, Mr. Examiner, when an agreement is placed before you and you see that it particularizes boiler-makers, shipwrights, carpenters, painters, so on down the line, no mention of machinists, there is a rather familiar legal maxim which covers such a situation. If it were intended that machinists would be covered, they would have been mentioned in there.

Now, furthermore, even though the parties have given this contract effect so as to cover machinists and thus may argue that the document, which does not speak for itself so as to cover machinists has been orally amended or enlarged so as to cover machinists, it could not have covered machinists

for the reason the Council had never been designated as collective bargaining representative of the machinists at the yard. The testimony shows, and I believe it has been stipulated, as a matter of fact, that all machinists there were members of Local 1304 from the second day of January through the 25th of January. They certainly had not designated the Bay Cities Metal Trades Council to represent them in matters of collective bargaining, and the Metal Trades Council had no authority to enter into a contract affecting them.

Following the argument of the Board that the machinists constitute a separate appropriate bargaining unit and that the contract did not cover the machinists, it followed, of course, that the discharges on January 25, 1945, were unlawful. [350] To be lawful they would have had to have been made in accordance with the terms of the valid closed-shop agreement and certainly such an agreement did not exist here with respect to the machinists. It is doubtful that within the meaning of the term as we use it in the Act and decisions of the Board that the contract was valid at all. It was made according to the undisputed testimony of the witnesses on the second day of January, at a time when, on the payroll of the respondent, there appeared names of 8 hourly-rated employees. Mr. Lehaney, or I believe it was Mr. Rotel, testified that it was his understanding that perhaps 850 employees would find work at the Graham Ship Repair Company. Certainly if an employer came to San Francisco, opened up a brand new operation, put 8 em-

ployees on the payroll intending to hire 850 and then entered into a closed shop agreement with a labor organization, the Board would not consider it a valid agreement.

If the Bay Cities Metal Trades Council contract on January 2nd, 1945, was a valid contract, it is valid only on the theory that the respondent here had an obligation to deal with the Council as representative of its hourly-rated employees other than machinists, because the Council had been the bargaining representative of the hourly-rated employees of the Judson-Pacific War Industries. It under no theory, to my opinion, can be held to be a valid collective bargaining agreement [351] covering the machinists at the respondent's yard.

Now as to three of the alleged 8(3's), I wish to make some comment. Those three are Wall, Whatley and Lee. Each of these men was hired according to Mr. Hostetler, by Mr. Hostetler on the 25th day of January, 1945, and expected to go to work on the 26th of January. On the afternoon of the 25th, as the record will show, Mr. Hostetler was advised—I have forgotten just what words he used, but at any rate, that the CIO machinists would no longer be employed in the yard. Mr. Hostetler testified he got word to Wall, Whatley and Lee what had developed there and as a consequence they did not report to work on the 26th.

It is the contention of the Board that Wall, Whatley and Lee were discriminated against with respect to their hire and employment within the

meaning of Section 8(3) of the Act and that the finding of these three should not differ in any respect to the finding concerning the eleven employees who actually worked for the respondent on that date.

I believe that is all.

Trial Examiner Myers: Mr. Sapiro, do you wish to say a few words?

Mr. Sapiro: Well, if the Examiner please, the highlights of the points that are involved here have been covered by Mr. Royster and it would be just a waste of time for me to go over the same things, but I would respectfully request, [352] and I know the Examiner will read the two decisions involving this particular contract which has been characterized by two of the witnesses as a closed-shop contract. Those two decisions answer in detail——

Trial Examiner Myers: You mean Bethlehem?

Mr. Sapiro: Bethlehem and Rosenshine decision, and I do not know whether the Examiner has that. I would be glad to furnish that.

Trial Examiner Myers: I have not the Rosenshine.

Mr. Sapiro: I will submit our copy in connection with the argument. I will submit that. This is the only copy we have, and may I request the Examiner when he is quite finished with it that he return it.

Trial Examiner Myers: Who granted that decision?

Mr. Sapiro: Well, it was rendered by Albert A. Rosenshine, Special Board Representative of

the National War Labor Board, and was incorporated thereafter by formal Order putting it in force and effect. The Order, I think, adopted it without going into detail.

Mr. Janigian: Yes, but you will stipulate that that Order and that decision had no reference to the Judson-Pacific yard.

Trial Examiner Myers: He is just calling my attention to a decision just like he would call my attention to a Court decision. [353]

Mr. Sapiro: That is correct.

Mr. Janigian: As an authority?

Mr. Sapiro: As an authority, certainly. We can quote any case.

Mr. Janigian: The Trial Examiner is the judge of the weight of all authorities.

Mr. Sapiro: Certainly he is.

Trial Examiner Myers: Thank you.

Do you wish to say anything, Mr. Stimmel?

Mr. Stimmel: Yes, I would like to say a word or two.

Trial Examiner Myers: I would appreciate what you would say. I would like to get your ideas about this case.

Mr. Stimmel: That Mr. Lehaney received no authority to sign a contract, I think the evidence will show that until around January 6th, at which time he received a limited authority to sign an A.F.L. contract and that Mr. Close was to sign the C.I.O. contract. [354]

That the contract which Mr. Lehaney signed, if

he did sign it, and he did, exceeded his authority in regard to the C.I.O. machinists.

Trial Examiner Myers: Is it your contention that the contract with the A. F. of L. Council did not cover the machinists at the respondent's operation?

Mr. Stimmel: That the contract which Mr. Lehaney was authorized to sign was the same type of contract that was in the other yards in the East Bay district and that he was instructed specifically at that time that Mr. Close was the authorized agent to sign the C.I.O. contract and that circumstance was brought out in the evidence by the testimony of Mr. Lehaney himself who stated that when he was told to sign a contract with the A.F.L. and the C.I.O., he demurred to it, stated he could not sign a C.I.O. contract because he was a high official of the A. F. of L. and that he suggested Close sign such a contract.

Trial Examiner Myers: But my question is, and I am just thinking out loud when I am discussing this, I have not come to any conclusion whatsoever, as to the facts in the case—is it your contention that the agreement with the Council does not cover machinists?

Mr. Stimmel: Yes.

It is also our contention that the Graham Company did not refuse to bargain with the C.I.O.; that they specifically [355] made a request for a contract not only once, but numerous times; that on the 15th of January Mr. Smith promised to sign a contract and date it back to January 12th.

But he failed to produce the contract, signed, or to demand or ask that the contract be signed by the Graham Ship Repair Company.

That the Graham Ship Repair Company employed only C.I.O. machinists from January 2nd to January 25th.

That Mr. Smith was always ready and willing to sign a contract. That his authority has never been cancelled by Mr. Graham.

Trial Examiner Myers: Why did he discharge the employees, the C.I.O. employees on January 25th?

Mr. Stimmel: Well, on January 25th Mr. Lehaney stated to Mr. Graham that the A. F. of L. had notified him that he would either have to start hiring A. F. of L. machinists in the future or they would pull the yard.

Trial Examiner Myers: Who would pull the yard?

Mr. Stimmel: A. F. of L.

Trial Examiner Myers: What does the expression "pull the yard" mean?

Mr. Stimmel: They would recall their men, all of the A. F. of L. crafts from the yard. That came out in the testimony.

Thereafter, Mr. Lehaney issued instructions that Mr. Close follow that Order. [356]

Trial Examiner Myers: And discharge the CIO?

Mr. Stimmel: No, he did not do that. At five o'clock he notified the head machinist that hereafter only machinists with A. F. of L. cards would be employed or hired, I would say.

Trial Examiner Myers: Who notified?

Mr. Stimmel: The head machinist. Mr. Close notified the head of the machinist crafts.

Trial Examiner Myers: What else did he tell him?

Mr. Stimmel: Well, he told him that hereafter only men who carried an A. F. of L. card would be employed in the future.

Mr. Janigian: Might I interject this observation, Mr. Trial Examiner, that since the statements of counsel do not appear in evidence, if he wishes to give testimony he ought to be sworn.

Trial Examiner Myers: This is just all argument, not even really oral argument. It is more an informal discussion. What Mr. Stimmel says now is not evidence, not going to be construed as evidence.

Mr. Janigian: But what I mean there is no testimony as to what Close said, that is what I am getting at.

Mr. Stimmel: I believe Mr. Close made a statement. It is in evidence there and we will stick with the record as it were. [357]

That shortly thereafter the men went into a conference, notified the head of the machine shop, and Mr. Close through them that they would not and could not work alongside of A. F. of L. machinists, and when the quitting time came at seven o'clock they went off shift and thereafter nobody showed up for work the next day.

It is our contention that the men struck or aban-

doned their positions. They were not fired or laid off.

It is also our position that the Union, having failed—that is, the CIO Union having failed to sign a contract or present one, although requested several times to do so, hardly represented these machinists and the company proceeded to deal with the men individually, but no man presented himself for his position or reinstatement after the 25th of the month or since.

That the Graham Ship Repair Company, as stated before, was willing and still is willing to bargain with the C.I.O. union.

That the contract made with the A. F. of L. does not cover the machinists and that Mr. Lehaney exceeded his authority if he attempted to include it in that contract.

That is our position. That is all.

Trial Examiner Myers: Mr. Janigian.

ORAL ARGUMENT ON BEHALF OF THE COUNCIL

Mr. Janigian: Mr. Trial Examiner, we have had some [358] surprises in this case, but I think the greatest surprise was Mr. Stimmel's statement as to the coverage of this A. F. of L. agreement. I want to make an observation with respect to that statement before I answer Mr. Royster.

Trial Examiner Myers: I might ask Mr. Stimmel if by that offer to bargain with the C.I.O. does he also offer to reinstate the fourteen persons

named in the Complaint to their former position or substantially equivalent position?

Mr. Stimmel: I might state to the Court that at the time this crisis arose and this notice was given to the machinists, a conference was held also with the A. F. of L. immediately following that at which time both Unions were pressing for action there in their favor and Mr. Graham told Mr. Smith, according to what Mr. Graham told me, that inasmuch as things have come to what they have, why he was not going to do anything one way or the other, that he would leave it to the National Labor Relations Board to settle, and whatever their decision was he would abide by.

He also passed that information on to the A. F. of L. at his meeting with them, and that is his position at this time.

Trial Examiner Myers: Very well.

Mr. Janigian: Mr. Trial Examiner, I think the evidence is crystal clear on the proposition that, first of all, Mr. Graham authorized Mr. Lehaney to sign the contract, that he had appointed Mr. Lehaney as his labor relations director. [359]

It is also quite clear that Mr. Graham knew nothing about the existence of the C. I. O. Union 1304 until sometime prior to the 5th and after the 2nd. That is Mr. Graham's own statement.

Mr. Stimmel: The 5th, I believe I may volunteer that.

Mr. Janigian: Now, the evidence is also quite clear that Mr. Graham admitted at this meeting that he had with Mr. Smith, Mr. Lehaney and

others on the 16th, that he had an agreement with the A. F. of L. and that agreement covered the machinists and consequently he could not sign another agreement with Mr. Smith. That is in the record. It is almost in that same language. That is Mr. Graham's statement, so this statement by counsel that Mr. Lehaney did not have any authority to sign the agreement or that our agreement could not cover machinists is somewhat of a surprise and something that certainly the evidence does not support.

All of the actions on the part of the Graham Ship Repair Company have been consistent with the acknowledgment by them of the fact that the agreement did cover all production and maintenance employees, including machinists. The complaint by the Bay Cities Metal Trades Council that C. I. O. machinists were employed, that the decision finally to replace C. I. O. machinists with A. F. of L. machinists and the A. F. of L. machinists being actually put to work on the 25th and the cessation of work on the part of C. I. O., all that is consistent [360] with what has been testified to by all the witnesses, that an agreement was signed first on the 2nd and again on the 9th, 10th or 11th, a week or so later, and that agreement was intended to cover all employees.

Now, Mr. Royster makes some statement that the agreement could not cover machinists. He had reference to the agreement, which is in evidence as Council's, I think, Exhibit 1, and again as Exhibit 4, the so-called "Master Ship Repair Agree-

ment." Now, when we consider the discussions had from the very beginning and we have in mind the discussions on the 4th, when the whole subject of the conference that was had at the office of the Bay Cities Metal Trades Council was the question of the machinists, whether the A. F. of L. could furnish the sufficient number of machinists, I cannot conceive of there being any doubt in anyone's mind but that the agreement was intended to cover machinists.

Now, Mr. Royster would lead you to believe that in all of the shipyards there is a separate agreement covering machinists. Well, I do not know if Mr. Royster knows the facts, but the evidence indicates that the Master Agreement covering new ship construction and the Master Ship Repair Agreement is signed by all the yards in this area and Mr. Rotel named a long string of yards, but he did admit that with respect to a certain number of named yards in Alameda County the Council did not represent the machinists. But that [361] is something entirely different from the contention which the Board is now making, that in all the yards the Council's Agreement does not cover machinists. The Council's agreement certainly does cover machinists.

Now, I think the issues in this case are quite simple. A great deal of time has been taken in developing the testimony. I have been guilty probably for some of the delay because of my inability to get Mr. Lehaney, but when you read the complaint you see that the issue presented is the ques-

tion of whether or not all of the production and maintenance employees constitute an appropriate unit, including machinists, and whether the machinists and persons who fall in that category, including helpers, trainees, etcetra, constitute an appropriate unit.

Now, it is very elementary that we have been called in to answer this complaint. Despite the attempt to amend the complaint we still are confronted with the allegations contained in the complaint. It cannot be expanded, they are definite allegations in the complaint charging violations of the National Labor Relations Act.

Now, the complaint states in so many words that the machinists constitute the unit; that a contract which seeks to include machinists with other production employees covers a unit which is not appropriate for collective bargaining.

Now, I am willing to concede that machinists under many [362] circumstances constitute an appropriate unit. The Board's own decisions show scores and scores of cases where machinists have been certified on the basis of their showing that they represent a distinct craft. The work of machinists is concededly the work of skilled, trained mechanics, and they constitute a craft.

On the other hand, the many decisions of the Board show that all of the production and maintenance employees in the shipyard constitute an appropriate unit. Now, unless it is shown that at that time the contract was signed the unit was inappropriate under any interpretation made by

the Board under any prior ruling, the Board may not at some subsequent date say, "Well, you signed an agreement which under some circumstances could be considered appropriate, but we do not think it is appropriate because the machinists could also constitute an appropriate unit."

It may well be that the collection of certain crafts would constitute an appropriate unit or a department might under certain circumstances constitute an appropriate unit, but where a contract has been entered into in good faith and if the unit covered is considered an appropriate unit on the basis of the various tests which the Board has laid down on the basis of the provisions of the Act itself, then I do not think that subsequent to the execution of the contract a union may be heard to say, "Well, we think the [363] machinists could constitute an appropriate unit."

Now, if the claim was made prior to the signing of the agreement or if Mr. Graham knew of the disexistence and disclaim of the C. I. O. union, then conceivably it might have been a matter for Board action to determine by an election whether the machinists would constitute an appropriate unit. That was the action taken in the Bethlehem-Alameda case, a case with which I am familiar because I represented the Council in that case. The Board held that in that case that by reason of the background, historical background of the dealings by the company, the Bethlehem Steel Company with Local 1304 over a period of many years, obtaining itself from that union, recognizing the

union for the purpose of discussing grievances and what-not, that the machinists constitute an appropriate unit.

Now, that is not the situation in this case. If the Board were to make the holding that an employer and the union would sign a contract at its peril in every instance and that such contract may be abrogated at the whim of the Board because someone might claim that conceivably some other unit might be carved out of a larger unit, or conceivably that a smaller unit should constitute a part of a larger unit, then we certainly would have no stability in our industrial field because the contract could not be signed with safety before the matter was submitted to the Board and [364] the finding, official finding was made by the Board as to whether or not the unit was appropriate.

As I stated before, the decisions of the Board are replete with numerous instances in which the Board has held that the plant unit is appropriate. The existence of the Master Agreement on the Coast and the fact that all of the yards on the Coast and the yards in the Bay Area have signed that Master Agreement and the decisions by the Board in the Atlantic Coast yards approving of these plant units and in some instances excluding patternmakers, for instance, and I know at least in one instance where molders were excluded on the showing made—but on the basis of those decisions of the Board these persons were perfectly justified in proceeding and signing the agreement which they did, and we submit the agreement is valid. We submit that there

is no issue of the expanding unit in this case because the complaint is not addressed to that issue. The complaint is addressed to the one issue of the appropriateness of the unit—A unit of production and maintenance employees which would also include machinists. That is the whole issue in the complaint. We submit that upon the showing that is made that the complaint should be dismissed.

Trial Examiner Myers: I will reserve decision on the motion to dismiss.

Has anybody else anything to add to what they have already [365] said?

Mr. Sapiro: Simply answering Mr. Stimmel, stating that these men were not discharged, that is, the C. I. O. men, I think the Trial Examiner will remember the testimony that Al Rogers told these men that "You are through. The A. F. of L. is taking over." And that shortly thereafter the same conversation was had with Mr. Close, where he told them they were through.

Now, I will submit that is a discharge.

Now, Mr. Janigian, in his fluent or fluid way, has made an argument which is quite cold, which might have been addressed at one time to some governmental agency having jurisdiction as to what an appropriate unit in the Bay Area is for collective bargaining, especially where machinist are concerned. I say that that question is foreclosed as to the Bay Area, and when he made the statement, Mr. Janigian made the statement that in so far as this record is concerned there is no showing as to how many plants in the jurisdiction of 1304 that

operate under this particular Master Contract where the C. I. O. have either written contracts or oral contracts, I call the Examiner's attention to the testimony of Mr. Rotel. On cross-examination I took the shipyards, repair shipyards in the East Bay Area and called his attention to them one by one, and in each instance he admitted that in those cases, in those named cases there was this so-called Master Agreement and that the C. I. O., 1304, had separate agreements, and when the Trial Examiner asked him whether or not he considered that a violation of the Master Agreement he stated that which was a fact, that owing to the litigation, to the various times that ship repair agreement had been construed they acceded to the ruling.

Now, what makes this case different from that than the circumstances surrounding, the other conditions, I do not know, but the Trial Examiner will remember when Mr. Truax was on the stand I put the question to him directly whether he knew of any yards in Alameda County ship repair or new construction that employed A. F. of L. machinists and he said yes, he knew of the Graham Ship Repair Yard, and he knew of no other, and that is the fact. That stands undenied in the record.

Trial Examiner Myers: Mr. Stimmel, do you want to add anything to that which you have already said?

Mr. Stimmel: Nothing except to call the Board's attention to the fact that as late as January 4th at a conference between Graham, Lehaney, Rotel and Truax that Mr. Truax and Rotel stated that

the Metal Trades were under no obligations to Graham until and unless he signed a Master Contract for that yard the same as other yards had in the district.

Trial Examiner Myers: Mr. Stimmel, you have not filed an answer on behalf of the respondent, Graham Ship Repair. I [367] was wondering whether you concede that the Board has jurisdiction over Graham Ship Repair.

Mr. Stimmel: Well, I still think our objection is good, Graham is not engaged in interstate business. The ships that are delivered there, he does not know whether they come from.

Trial Examiner Myers: The reason I asked you that, you said during oral argument you were willing to submit the matter to the Board for decision.

Mr. Stimmel: Well, I will withdraw my objection to the jurisdiction then.

Trial Examiner Myers: You concede the jurisdiction of the Board?

Mr. Stimmel: Yes.

Mr. Royster: I believe I will say this, Mr. Examiner, I would like to direct the Examiner's attention to this circumstance: that Mr. Lehaney testified on the first occasion when he spoke to Mr. Rotel and before a contract was signed Mr. Rotel told Lehaney that other yards in the Bay Area coming under this Master Agreement had their machinists represented in a separate unit, but that Graham coming in here this was a new proposition, in some undefined way it was different, and

in this case why the machinists would come under the Master Agreement. [368]

It is my recollection that this information was given to Mr. Lehaney, the agent of Graham Ship Repair Company, before there was any contract signed.

Mr. Sapiro: By his own testimony, I think he said something like that.

Trial Examiner Myers: Do you want to add something, Mr. Janigian?

Mr. Janigian: Nothing except this: that we are anxious to obtain a ruling on this proposition. I mean if it is the law and if it is to be the decision of the Board that the interests of the crafts are to be protected even after a contract is signed, including or covering a unit which the Board has recognized in other decisions as an appropriate unit, we want to know about that.

I have nothing else at all.

Mr. Sapiro: Just one word; Mr. Smith called my attention to that at the time of the so-called signing of this contract the A. F. of L. did not have a single member of the machinists' craft in their employment. [369]

[Endorsed]: No. 11267. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. W. C. and Agnes Graham, doing business as Graham Ship Repair Co., Respondents. Transcript of Record. Upon petition for enforcement of order of the National Labor Relations Board.

Filed March 6, 1946.

/s/ PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11267

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

W. C. and AGNES GRAHAM, doing business as
GRAHAM SHIP REPAIR CO.,
Respondents.

ANSWER OF THE BAY CITIES METAL
TRADES COUNCIL, A. F. OF L., PARTY
TO CONTRACT, TO PETITION FOR EN-
FORCEMENT OF ORDER OF NATIONAL
LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit:

Comes now the Bay Cities Metal Trades Council,
A. F. of L., party to contract, hereinafter referred
to as Council, and answering the petition for en-
forcement of an order of the National Labor Re-
lations Board herein, admits, denies and alleges:

1. Answering the allegations of paragraph (1)
of said petition, Council admits the allegations con-
tained in said paragraph.

2. Answering the allegations of paragraph (2)
of said petition, Council admits that under date of
September 12, 1945 the National Labor Relations

Board, hereinafter referred to as the Board, issued its decision and order, a portion of which is set forth in said paragraph and in that behalf Council alleges that the said decision and order are and each of them is illegal and void and were made in excess of the jurisdiction of the Board.

Further answering said petition Council alleges:

1. That the said decision and order and every finding of fact and conclusion of law contained therein, are and each of them is against law and are not supported by substantial or any evidence in the particulars and for the reasons set forth in Exceptions of the Bay Cities Metal Trades Council, A. F. of L., filed with said Board.

2. That by reason of adverse rulings on the part of the Trial Examiner and the Board, Council was denied a fair and impartial hearing and was thereby prevented from properly presenting its defense or having its day in court and that the said adverse rulings prejudicially affected the substantial rights and interests of Council and were and each of them was erroneous and against law.

3. That each and every purported finding, conclusion or order contained in said decision and order which relates or refers to alleged violations on the part of respondent of any of the provisions of the National Labor Relations Act is not supported by substantial or any evidence and is contrary to the evidence.

4. That paragraph 1(a) of the Board's order is

unlawful in that it would require respondent not to discourage membership in East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, hereinafter referred to as Local 1304, or refusing to employ any member of said labor organization, by conditioning further employment upon membership in the Bay Cities Metal Trades Council, A. F. of L., for the reason that under the terms of a contract dated January 2, 1945, entered into by respondent with Council, membership in the Council was a condition of employment by respondent; that the said contract was entered into when the Council was the lawful exclusive representative of the employees of respondent within the meaning of Section 9 of the Act and the Council at said time was not a labor organization established, maintained or assisted by any action defined in said Act as an unfair labor practice; and that each and every finding, conclusion or order to the effect that said Council was nor or is not the lawful exclusive representative of said employees of respondent within the meaning of Section 9 of the Act or was a labor organization established, maintained or assisted by any action defined in said Act as an unfair labor practice is not supported by substantial or any evidence and is contrary to the evidence.

5. That said order is unlawful in that it would forbid the recognition by respondent of Council as the exclusive representative of its employees for the purposes of collective bargaining despite the fact that said Council was, and is, the lawful rep-

representative of the employees of respondent as set forth in the preceding paragraph.

6. That said order is unlawful in that it would abrogate contract between respondent and said Council dated January 2, 1945 on the erroneous finding that at the time the contract in question was entered into said Council was not the lawful, exclusive representative of the respondent's employees within the meaning of Section 9 of the Act and that any finding, conclusion or order that the Council was not or is not the lawful exclusive collective bargaining representative of the employees of respondent is not supported by substantial or other evidence.

7. That any finding, conclusion or order to the effect that Local 1304 was or is the exclusive representative of certain employees of respondent referred to in paragraph 1(d) of said order is not supported by substantial or any evidence and is contrary to the evidence and the provision of said order which forbids respondent to refuse to recognize and bargain with Local 1304 as such representative and which would compel respondent to bargain with Local 1304 as such representative are and each of them is unlawful.

8. That any finding, conclusion or order to the effect that respondent has or is now urging, persuading, intimidating or coercing its employees to join the Council and not to join Local 1304 or any other labor organization is not supported by substantial evidence except that the collective bargain-

ing agreement referred to in paragraph 4 hereof has been enforced.

9. That any finding to the effect that respondent locked out or discriminatorily discharged any of its employees or refused to rehire such employees except as it enforced the provisions of said agreement between respondent and the Council is not supported by substantial or any evidence.

Wherefore the Bay Cities Metal Trades Council, A. F. of L. prays that this Court deny the said petition of the National Labor Relations Board and that the said decision and order of the National Labor Relations Board be set aside and annulled.

/s/ CHARLES J. JANIGIAN,

Attorney for Bay Cities Metal Trades Council,
A. F. of L.

(Duly Verified.)

[Endorsed]: Filed April 9, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ANSWER TO THE PETITION FOR THE EN-
FORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

W. C. and Agnes Graham, doing business as Gra-
ham Ship Repair Co., a co-partnership, hereinafter

sometimes referred to as Company, answers the petition presented to this Honorable Court for the enforcement of a certain order issued by the National Labor Relations Board, hereinafter sometimes referred to as the Board, against the Company.

The proceedings in which said order was issued by the Board is known upon the records of the Board as Case No. 20-C-1304, the title thereof being, "In the Matter of W. C. and Agnes Graham, doing business as Graham Ship Repair Co. and East Bay Union of Machinists, Local 1304, C. I. O. and Bay Cities Metal Trades Council, A. F. of L., Party to the Contract, Case No. 20-C-1304."

In answer to the said Petition of the Board to this Honorable Court, the Company respectfully:

I.

Admits the allegations contained in Paragraph 1 of the Petition.

II.

Admits that the Order set forth in Paragraph 2 of the Petition was made and issued by the Board and filed with this Court, but denies any knowledge or information sufficient to form a belief as to whether said Order was based upon all of the proceedings had in said matter before the Board, and denies that the Board duly stated its Findings of Fact, Conclusions of Law and/or thereupon issued an order directed to the Respondents, their agents, successors and assigns.

Respondents further deny the commission of any unfair labor practices as therein alleged; Respondents further allege that said Findings of Fact, Conclusions of Law and Order, are and each of them, is illegal and void in that the Board acted without and in excess of its powers and jurisdiction in the making thereof.

III.

Admits the allegations of Paragraph 3 of said Petition.

IV.

Admits the allegations of Paragraph 4 of said Petition.

V.

In further answer to the Petition of the Board Respondent respectfully alleges that the Findings of Fact and Conclusions of Law made by the Board are unsupported by adequate or substantial evidence; in further answer to the Petition the Company respectfully alleges that the Findings of the Board and the Conclusions of Law upon which the following orders were issued to the Company are unsupported by adequate or substantial evidence and are contrary to the evidence:

1. That the Company cease and desist from:

- (a) Discouraging membership in East Bay Union of Machinists, Local 1304, affiliated with Congress of Industrial Organizations, or in any other labor organization of their employees, by laying off, discharging or refusing to reinstate any of their employees, by refusing to employ any

member of the said labor organization, by conditioning further employment upon membership in Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of their employment;

(b) Recognizing Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, as the exclusive representative of the employees in the appropriate unit described in paragraph 2 (c) of this Order.

(c) Giving effect to their contract, dated January 2, 1945, with the Bay Cities Metal Trades Council, affiliated with the American Federation of Labor, or to any extension, renewal, revision, modification or supplement thereof or to any superseding contract which may now be in effect, insofar as it affects their employees in the appropriate unit described in paragraph 2 (c) of this Order.

(d) Refusing to bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of their employees in the appropriate unit described in paragraph 2 (c) of this Order, with respect to rates of pay, wages, hours of employment and other conditions of employment.

(e) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form labor organizations, to join or assist East Bay Union of

Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Taking the following affirmative action:

(a) Offer to Frank E. Shaffer, James E. Potter, Elga O. Ashcraft, Gus B. Berness, Thomas F. Wright, Benjamin F. Clark, Jim H. Clark, William (Bill) Searing, E. P. Hostetler, C. B. Lewis, Albert B. Sequeira, Daniel C. Wall, Willis H. Whatley and Lloyd M. Lee immediate and full reinstatement of their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges;

(b) Make whole the employees named in paragraph 2 (a) of this Order for any loss of pay they may have suffered by reason of the Respondents' discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from the date of the Respondents' discrimination against him to the date of the Respondents' offer of reinstatement, less his net earnings during such period.

(c) Upon request, bargain collectively with East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all the Respondents'

machinists, machinist helpers, machinist specialists, machinist apprentices, and machinist trainees, but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(d) Post in their ship repair yard at Oakland, California, copies of the notice attached hereto marked Appendix "A". Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondents' representative, be posted by them immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondents to insure that said notices are not altered, defaced or covered by any other material;

(e) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

Respondents further deny the commission of any unfair labor practices as herein alleged or intimated.

VI.

In further answer to the said Petition of the

Board Company respectfully alleges that the Board has acted without and in excess of its powers in making and entering its Findings of Fact, Conclusions of Law and Order in this matter by reason of the lack of adequate or substantial evidence to support same.

VII.

In further answer to the said Petition of the Board Company respectfully alleges that the evidence affords no reasonable basis for the Conclusions of the Board, as embraced within its Findings of Fact, that there were unfair labor practices on the part of the Company against East Bay Union of Machinists, Local 1304, affiliated with the Congress of Industrial Organizations, or any of the members thereof.

VIII.

In further answer to the petition of the Board Company respectfully alleges that said decision and order and every finding of fact and conclusion of law contained therein, are and each of them is against law.

IX.

In further answer to the Petition of the Board Company respectfully alleges that said decision and order and every finding of fact and conclusion of law, are and each of them is contrary to evidence.

X.

In further answer to the said Petition of the Board the Company respectfully alleges: That throughout the proceedings before the Board Com-

pany has consistently taken the position that it would abide by any lawful order of the Board; that upon consideration of the transcript of the entire proceedings before the Board, including the pleadings, testimony and evidence, Findings of Fact, Conclusions of Law and Order of the Board, the Company is advised and therefor respectfully alleges that same are unlawful in that the said Board acted without, and in excess of, its powers in making its said Findings of Fact and Conclusions of Law and Order in this matter by reason of the lack of adequate or substantial evidence to support same;

That for the above reasons Company respectfully requests that it be heard before this Honorable Court and be granted the right to resist the enforcement of said Order of the Board filed herein, which it believes to be unlawful and without and in excess of the powers of said Board to issue against said Company by reason of the lack of adequate and substantial evidence supporting said order on the matters hereinabove set forth which will hereafter be more particularly set forth in briefs to be filed herein.

Wherefore, the Company prays this Honorable Court that it set aside the Order of said Board in whole, or, if such prayer be denied that it set aside the said Order of said Board in such part as the same is unsupported by evidence, as hereinabove in this Answer sets forth with particularity, and insofar as to set aside, that the Court relieve the Com-

pany, its officers, agents and representatives, of any necessity to comply therewith.

HARDIN, RANK, METZLER

& FLETCHER,

By /s/ HERMAN COOK

/s/ BERNARD STIMMEL

Attorneys for Respondents.

(Duly Verified.)

[Endorsed]: Filed April 18, 1946. Paul P.
O'Brien, Clerk.

No. 11,267

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, <i>Petitioner,</i> VS. W. C. and AGNES GRAHAM, Doing Business as Graham Ship Repair Co., <i>Respondents.</i>

BRIEF FOR W. C. AND AGNES GRAHAM,
Doing Business as Graham Ship Repair Co., Respondents.

HARDIN, RANK, MELTZER & FLETCHER,
Central Bank Building, Oakland 12, California,
BERNARD B. STIMMEL,
Mills Tower, San Francisco 4, California,
Attorneys for Respondents,
W. C. and Agnes Graham, doing business
as Graham Ship Repair Co.

FILED

SEP 4 - 1946

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No. 11,267

IN THE
United States Circuit Court of Appeals
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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

W. C. and AGNES GRAHAM, Doing Business
as Graham Ship Repair Co.,

Respondents.

BRIEF FOR W. C. AND AGNES GRAHAM,

Doing Business as Graham Ship Repair Co., Respondents.

FACTS AND ISSUES.

The National Labor Relations Board has issued an order against Respondents allegedly designed to effectuate the purposes of the act (National Labor Relations Act, 49 Stat. 449), designed "to diminish the cause of labor disputes burdening or obstructing interstate and foreign commerce * * *" the stated policy of which is in part "Experience has proved that the protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain rec-

ognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.”

The admitted and undisputed facts upon which the Board’s order is based are succinctly these: (1) In December, 1944, Respondent leased a ship repair yard in Oakland, California, and took possession thereof on January 1, 1945. (R. 98, 112-114, 118; Board’s Brief 4.) (2) Thereafter, Respondent sought manpower to operate the yard. (R. 258.) (3) Council advised Respondent that no manpower would be furnished unless he signed Council’s ship-repair agreement. (R. 259; Board’s Brief 5.) (4) A memorandum was executed on January 2nd and the agreement signed on January 9, 1945. (R. 251-252, 281-282; Board’s Brief 5-6.) (5) On January 5, the Union contacted Respondent and requested it to sign the standard contract for the machinists. (R. 176-177.) Respondent agreed and requested the Union to bring its contract to the yard on January 17th for signature. (R. 179; Board’s Brief 6.) The Council thereafter took the position that the agreement Respondent had signed with it was a complete closed shop agreement and that they would not let the yard operate unless it was such an agreement. (R. 243, 295-297; Board’s Brief 7, 12.) Respondent advised the Union of Council’s interpretation of the agreement and requested the Union’s assistance in persuading the Council to permit Respondent to deal

with the Union for the machinists. (R. 244-245; Board's Brief 6-7.) Thereafter, a series of negotiation conferences were held by Respondent with the Council wherein Respondent sought to persuade the Council to waive its claim to exclusive jurisdiction of the machinists. (R. 246; Board's Brief 6.) During this period Respondent continued to hire machinists through the Union and the Union permitted the men to work in the yard alongside of the AFL crafts (R. 142, 207, 250, 342-343; Board's Brief 7) and no AFL machinists were hired or permitted to work at the yard. (R. 297.) On January 25th the Council advised Respondent that unless machinists from the AFL were put to work they would consider the agreement abrogated, feel under no further obligation to furnish any other craftsmen and would withdraw those AFL employees then working in the yard and put them into firms which fulfilled their contracts with the AFL. (R. 295-297; Board's Brief 7.) On the evening of the same day three AFL machinists came to the yard and were hired by Respondent (R. 208-209) and the Union machinists were pulled from the yard. (R. 375.) Only one machinist from the Union, who received special permission from its business agent to complete some important work, reported at Respondent's yard the following day. (R. 217-218, 209-210.) The Union machinists would not work with the AFL machinists. (R. 218-219, 137-138.) About ten days or two weeks later the Union machinists were paid off by Respondent. (R. 224.) No copy of the Council agreement or any notice to the effect that Union machinists

would not be employed after January 25th was ever posted by Respondent. (R. 134, 154-255.) Respondent continued negotiations with the Union and advised the business agent that he was sorry such a situation had come up and asked for advice as to what legal procedure would have to take place to settle the controversy. (R. 184.) About February 1st, Respondent advised the Union he would like the matter straightened out and that he felt it would have to go to some appropriate government agency. (R. 184; Board's Brief 7.) Thereafter, the Union filed charges of refusal to bargain and discriminatory discharge with the National Labor Relations Board. (R. 184-185.) Respondent filed no answer to the charges and appeared before the Board only for the purpose of presenting the full facts. Respondent was, and is, anxious to have this controversy between the Council and the Union brought to a conclusion by an appropriate agency empowered to determine such a jurisdictional dispute and to that end has at all times been ready and willing to abide by the lawful decision of the Board or any other department of the government which would assume jurisdiction to resolve the issues and enforce such decision when made.

Upon these facts, the Petition for Enforcement of the Board's order brings before the Court the following issues:

(1) Is there substantial evidence to support the finding and conclusion that as a matter of law Respondent refused to bargain collectively with the Union.

(2) Is there substantial evidence to support the finding and conclusion that as a matter of law Respondent discriminated in the hire and tenure of employment of the fourteen named employees to discourage membership in the Union and encourage membership in the Council.

(3) Is there any substantial evidence to support the finding and conclusion that as a matter of law Respondent interfered with, restrained and coerced his employees in the exercise of the rights guaranteed in Section 7 of the Act.

(4) If, as a matter of law the acts of Respondent can be held to have violated the Act in any of the above particulars, is the remedy proposed by the Board proper to effectuate the purposes of the Act under the facts and circumstances of this case.

ARGUMENT.

IS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AND CONCLUSION THAT AS A MATTER OF LAW RESPONDENT REFUSED TO BARGAIN COLLECTIVELY WITH THE UNION?

The evidence is that Respondent never refused to bargain collectively with the Union. From January 4th to the middle of February numerous meetings were held with representatives of the Union. (R. 130, 131, 148, 149, 150, 158, 160, 175, 176, 179, 180, 181, 184, 186, 244, 245, 246, 247, 365, 366.) Respondent's superintendent was authorized and directed to sign an agreement with the Union and its business agent was

requested to deliver a contract for signature. (R. 131, 149, 150, 158, 159, 179.) Between January 2nd and January 25th only machinists who were members of the Union were permitted to work in the yard. (R. 143, 153, 182.) Respondent continually requested the business agent of the Union to assist in resisting Council's claim of a "closed shop." (R. 244, 245, 246, 247.) Even after the Council had exercised its will of having AFL machinists work in the yard and members of the Union had walked out, Respondent continued to meet with the representative of the Union and stated that he was "sorry" (R. 184) that he would like "advice as to what legal procedure would have to take place to settle the controversy * * *" (R. 184) that "he felt it would have to go to some appropriate government agency" (R. 184) and that "he had to let it go through the channels of the constituted government agency." (R. 186.)

Section 8 (5) declares that it shall be an unfair labor practice for an employer "to *refuse* to bargain collectively with representatives of his employees * * *" (*italics ours*) and we assume the statute means what it says in simple English. Nowhere does the evidence in this case show that Respondent ever *refused* to bargain collectively with the Union. The fact is that Respondent at all times expressed a desire and a complete willingness to bargain collectively with the representative of the Union. True, Respondent never executed a collective bargaining agreement in writing with the Union, but the reason is obvious and the result is the same. Until January 25th, Respondent was

operating under an oral agreement reached through collective bargaining with the Union. (R. 179, 180.) This agreement was, and any agreement reduced to writing would have been abrogated when the Council exercised its claimed jurisdiction on January 25th and sent AFL machinists into the yard under threats of closing it down and the Union machinists left their jobs as a result thereof. The evidence is clear and undisputed that Respondent desired to continue to recognize the Council as the representatives of all crafts other than the machinists under its agreement theretofore executed in writing and to recognize the Union as the representative of the machinists pursuant to its oral agreement which it was willing at all times to reduce to writing. Respondent so stated to both labor organizations and bent every effort to obtain this result. That it was prevented from so doing by the deliberate actions of each of the labor organizations, cannot supply the requirement of the statute that it shall be an unfair labor practice for an employer “to *refuse* to bargain collectively with representatives of his employees. * * * ” (Italics ours.)

IS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AND CONCLUSION THAT AS A MATTER OF LAW, RESPONDENT DISCRIMINATED IN THE HIRE AND TENURE OF EMPLOYMENT OF THE FOURTEEN NAMED EMPLOYEES TO DISCOURAGE MEMBERSHIP IN THE UNION AND ENCOURAGE MEMBERSHIP IN THE COUNCIL?

Section 8 (3) of the Act provides in part that "it shall be an unfair labor practice for an employer * * * by discrimination in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *"

The evidence is that Respondent never took any action designed to encourage membership in the Council or to discourage membership in the Union. Respondent at all times explicitly stated to each of the organizations that it was his desire that the machinists be members of the Union and all other crafts be affiliated with the Council. (R. 244, 245, 246, 348, 349.) This is conceded by the business representative of the Union, who makes no charge against Respondent to the effect that he at any time attempted to discourage membership in the Union but on the contrary relates numerous instances wherein they discussed Union membership working in the yard and methods for reaching a settlement of the situation precipitated by the action of the Council in placing AFL machinists at work. (R. 175-190.) After the AFL machinists came to the yard the Union machinists would not work alongside them (R. 218-219) and at no time thereafter did the business representative of the Union express a willingness to have the Union machinists

return to their former employment and work along with the other machinists who were working there. (R. 189.) Union's machinists were not laid off by Respondent. (R. 138.) Respondent never posted any notice to the effect that, to continue their employment as machinists, employees had to be affiliated with the AFL or that any man who was affiliated with the CIO could not continue as a machinist. (R. 134.) Not even the contract, which the Council claims embraced the machinists, was ever posted. (R. 134.)

The Board takes the position that Respondent discharged the Union machinists and that the Council's claim of a closed shop contract cannot be a defense. Respondent does not rely upon such contract as a defense and has never evidenced agreement with Council's claim that the agreement constituted a closed shop for all crafts, including the machinists. The undisputed testimony is that Mr. Graham was at all times working with the business representative of the Union in an attempt to get the Council to relinquish its claim for the machinists. (R. 244, 245, 246, 247.) Neither for this or any other reason did respondent discharge any of the Union machinists.

We do not believe the evidence will support the Board's finding of a discriminatory discharge, but, assuming for purposes of argument that it does, the court must find that discouragement of membership in the Union or encouragement of membership in the Council may reasonably be inferred from the circumstances of the discharge. (*National Labor Relations*

Board v. Walt Disney Productions, 146 Fed. (2d) 44; *National Labor Relations Board v. J. G. Boswell Co.*, 136 Fed. (2d) 585, 595; *Western Cartridge Co. v. National Labor Relations Board*, 139 Fed. (2d) 855, 858; *Stonewall Cotton Mills v. National Labor Relations Board*, 129 Fed. (2d) 629, 632; *National Labor Relations Board v. Air Associates*, 121 Fed. (2d) 586, 592; *Martel Mills Corp. v. National Labor Relations Board*, 114 Fed. (2d) 624, 633.) The evidence in this case does not meet this test.

IS THERE ANY SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AND CONCLUSION THAT AS A MATTER OF LAW RESPONDENT INTERFERED WITH, RESTRAINED AND COERCED HIS EMPLOYEES IN THE EXERCISE OF THE RIGHTS GUARANTEED IN SECTION 7 OF THE ACT?

Even before commencement of operations, Respondent engaged a labor relations director who had "spent practically all of his life in the labor movement" (R. 121) and instructed him as follows (R. 124, Testimony of Warren C. Graham):

"The Witness. After we agreed to employ him, I told him that we wanted to establish fair relations with labor on the West Coast, and his job would be to show that we would try to enjoy pleasant relations with labor, and his job would be to promote such relations.

Q. (by Mr. Royster). Did you——

A. I told him that his job would be to report to me anything that management could do, which would affect those relations."

Thereafter, Respondent contacted Council and executed their ship-repair agreement. (R. 259, 251, 252, 281, 282.) Respondent also met with the Union and entered into an oral agreement with that organization for the machinists to be employed at the yard. (R. 181-182.) By every means at his command Respondent sought to continue this agreeable relationship—and did so until January 25th when the Council forced AFL machinists into the yard (R. 295-297) and the Union “pulled” its men from the yard. (R. 375.)

The unquestioned fair attitude of the company must be taken into consideration in a determination of whether or not it has interfered with, restrained or coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act. (*National Labor Relations Board v. Shenandoah-Dives Mining Co.*, 145 Fed. (2d) 542.)

In *National Labor Relations Board v. J. L. Brandeis & Sons*, 145 Fed. (2d) 556, the Court was called upon to determine whether or not certain statements made by the company to its employees constituted interference, restraint or coercion. In holding the respondent had not committed an unfair labor practice, the Court set forth the test to be applied in the following language:

“If respondent used coercive language it may be held responsible in these proceedings notwithstanding the constitutional guaranty of the right of free speech. We have fully set forth the remarks of the officers of the respondent because a consideration of the language used must determine

its character. *This is a question of law. The sole statutory test is interference, restraint and coercion.* Secs. 7 and 8, National Labor Relations Act; *Wilson and Co. v. NLRB*, 8 Cir., 123 Fed. (2d) 411; *NLRB v. Star Publishing Co.*, 9 Cir., 97 Fed. (2d) 465; *NLRB v. Cluek Brewing Co.*, 8 Cir., Fed. (2d) (Opinion filed Aug. 7, 1944); *NLRB v. Hudson Motor Car Co.*, 6 Cir., 128 Fed. (2d) 528." (Italics ours.)

Considering the unquestioned fair attitude of the company in its relations with representatives of its employees for collective bargaining purposes and applying to the evidence in this case the test above set forth, it must follow as a matter of law that Respondent has not at any time interfered with, restrained or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IF, AS A MATTER OF LAW, THE ACTS OF RESPONDENT CAN BE HELD TO HAVE VIOLATED THE ACT IN ANY OF THE ABOVE PARTICULARS, IS THE REMEDY PROPOSED BY THE BOARD PROPER TO EFFECTUATE THE PURPOSES OF THE ACT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE?

In *National Labor Relations Board v. Ford Motor Co.*, 5 Cir., 119 Fed. (2d) 326, it was held that the Court has power to determine if the Board's order is appropriate in view of the facts and circumstances of the particular case under review. In so holding the Court stated:

“Nothing in the statute, nothing in any of the decisions lends countenance to the view that Congress intended to make of the Circuit Court of Appeals mere rubber stamps, mere perfunctory executors of the Board’s unrestrained will. They make the contrary quite clear. It is, therefore, for this court in the performance of its function under the statute to say not blindly, but in the exercise of an informed description, first, whether the findings are supported by the evidence and second, *whether the Board’s orders are appropriate under the statute.*” (Italics ours.)

The United States Supreme Court in *Republic Steel Corp. v. National Labor Relations Board* (1940), 311 U. S. 7, has held that the power of the Board is essentially remedial and not punitive, stating in part as follows:

“We think that affirmative action to ‘effectuate the policies of this Act’ is action to achieve the remedial objective which the Act sets forth * * *”

In *National Labor Relations Board v. Express Publishing Company* (1941), 312 U. S. 426, the Court stated:

“Having found the acts which constitute the unfair labor practice, the Board is free to restrain the practice and other like or related unlawful acts. But, as the Court held in the case of the Federal Trade Commission, see *Federal Trade Commission v. Beech-Nut Co.*, supra (257 U. S. 441, 445), an order not so related should be appro-

privately restricted on review. The breadth of the order, like the injunction of a Court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which to the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. See *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 308, 309; *Standard Oil Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548; *Local 167 v. United States*, 291 U. S. 293; *Virginia Railway Co. v. System Federation No. 40*, 300 U. S. 515, 541, 543, 544.”

And in *National Labor Relations Board v. May Department Stores Co.*, 154 Fed. (2d) 533, 541, the Court stated:

“* * * the Supreme Court has stated that it is the Board’s province ‘to determine the needed scope of cease and desist order under the National Labor Relations Act’ and the function of the courts merely to test as a matter of law whether the scope of a particular order has a reasonable basis in the situation presented. *May Department Stores v. NLRB*, 326 U. S. 376, 66 S. Ct. 203, 212, 213, 90 L. Ed. The test of the proper scope of a cease and desist order is whether the Board might

For other decisions of the Supreme Court which emphasize the remedial nature of the Board’s powers under Sec. 10 (c) see:

Consolidated Edison Company of New York Inc. v. NLRB (1938), 305 U. S. 197;

H. J. Heinz Co. v. NLRB (1941), 311 U. S. 514;

Pennsylvania Greyhound Lines, Inc. v. NLRB (1938), 303 U. S. 261;

Phelps Dodge Corp. v. NLRB (1941), 313 U. S. 177.

have reasonably concluded from the evidence that such order was necessary to prevent the employer before it from engaging in any unfair labor practice * * * affecting commerce. Id. 66 S. Ct. at pages 211, 212. The Board may not enjoin violations of the provisions of the Act generally merely because a violation of one provision has been proved.”

It is not only contended by Respondent that the order issued by the Board and which it herein seeks enforcement by this Court, is too broad in its scope but we also contend that, based upon the evidence before the Court in this case, the order cannot be construed to effectuate the avowed policies of the Act “to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce * * *” and is therefore unlawful. This cause was not before the Board because of any act or thing willingly done by Respondent—this cause was before the Board because of the precipitate action of two labor organizations (1) by the Council in forcing AFL machinists into the yard and (2) by the Union in thereupon withdrawing its machinists members from the yard.

How can an order directed to Respondent requiring him to do that which the evidence discloses he was at all times earnestly attempting to accomplish but from which he was prevented from doing by the action of the labor organizations involved effectuate the stated purposes of the Act? Respondent is ordered to cease and desist from acts which the evidence affirmatively

shows he was at all times openly urging the two labor organizations to permit him to do. As stated by the Court in *National Labor Relations Board v. McGough Bakeries Corporation*, 5 Cir., 153 Fed. (2d) 420:

“It is our duty as well as the Board’s to see that the act is properly and fairly applied, and not brought into disrepute by unlawful or palpably unjust applications of it.”

It is clearly established that the validity of the Board’s order must depend upon the circumstances of each case and be appropriate to achieve the remedial objectives of the Act. The order under consideration does not meet this test. It appears that this is a case where the Board has been unable to find anyone other than Respondent that it can legally lay hands on and has succumbed to the temptation to issue against him an order to bring about a desired result between the labor organizations involved. Such action by the Board is not only unauthorized by the Act but places the Respondent in the paradoxical position of being ordered to do, under threat of contempt, that which he has been unsuccessfully trying to do.

(1) As stated in Board’s Brief (page 21):

“* * * the Board’s order runs only against Respondents, the real parties in interest of this proceeding and in any subsequent contempt action.”

(2) Even if Respondent in this case be deemed technically in violation of the Act the admonition of

the Court in *National Labor Relations Board v. Express Publishing Co.*, supra, would appear to be controlling

“* * * but the mere fact that a Court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.”

See also

National Labor Relations Board v. Armour and Company, 10th Cir. (on rehearing) January 8, 1945.

For these same reasons the order of the Board as applied to Respondent is punitive, rather than remedial to achieve the objectives of the Act as required by the decisions of United States Supreme Court cited supra. Particularly is this true of that portion of the Board's order requiring Respondent to make whole 14 machinists for their earnings during the time that they have not worked at Respondent's yard. Because of actions of the labor organizations involved the Board assesses Respondent with a punitive fine of many thousands of dollars. How can this be said to effectuate the remedial objectives of the Act where the evidence discloses that at all times it was Respondent's desire that they continue employment with him under conditions of hire and tenure of their own choosing? Reference has many times been made, in judicial opin-

ions and otherwise, of the extreme one-sidedness of the National Labor Relations Act wherein the employer is bound to comply with the orders of the Board but the employees are free to flout the Board's decision and create the anomalous and often calamitous situation wherein an employer is caught, without fault on his part, between the upper and nether millstones. Mindful of the harsh consequences of the Act, we do not believe that Congress intended or the Act authorizes the assessment of a penalty against the employer in a case such as the one under review.

CONCLUSION.

We earnestly submit that for reasons herein set forth the Board's order is against law and should not be enforced.

Dated, September 4, 1946.

Respectfully submitted,
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No. 11,267

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VS.

W. C. and AGNES GRAHAM, doing business
as Graham Ship Repair Co.,

Respondents.

BRIEF FOR
BAY CITIES METAL TRADES COUNCIL, A. F. OF L.

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STATEMENT OF JURISDICTION.

The petition for enforcement of orders contains appropriate allegations showing that the court has jurisdiction under Section 10 (e) of the National Labor Relations Act. (T 72-73.) The allegations are true. Jurisdiction of this court is therefore plain under said Section 10 (e). (29 U.S.C.A., sec. 160 (e).)

STATEMENT OF THE CASE.

This brief is filed by the Bay Cities Metal Trades Council, A. F. of L., hereinafter to be referred to as the Council. It was party to the contract of January 2, 1945, which the order sought to be enforced has impaired. (T 14.) The complaint issued by the Board on March 3, 1945 (T 3-11) was answered by the Council on March 16, 1945 (T 15-18), and it appeared in the hearing before the Trial Examiner and participated therein (T 88-419). At the conclusion of the hearing it moved to dismiss the complaint. (T 397.)

The Council duly excepted (T 19-21) to the Intermediate Report made by the Trial Examiner on June 8, 1945 (T 33-60). As the exceptions refer to the pages and lines of the Report as filed, correlation with the Report as printed in the Transcript is necessary. The Council excepted (Ex. 1, T 19) to the denial of its motion to dismiss (T 36, L 10-12); it excepted (Ex. II (1), T 19) to the finding that "The Council, however, offered no evidence in support of its contention" (T 38, L 23-25); it excepted (Ex. II (2), (3), (4), T 19-20) to the findings commencing with the words "In a matter" (T 40, L 5) and ending with the words "conditions of employment" (T 44, L 9); it excepted (Ex. II (5), T 20) to the findings commencing with the words "The respondents" (T 45, L 6-7) and ending with the words "Industrial Organization" (T 45, L 14), and (Ex. II (6), T 20) all of footnote 6 (T 45-46); it excepted (Ex. II (7), T 20) to the findings that "On the latter date, Lehaney and Graham instructed

Close to request Smith to prepare a contract covering the machinists" (T 47, L 2-4); it excepted (Ex. II (8), (9), (10), (11), T 20) to the findings commencing with the words "It is clear" (T 47, L 28) and ending with the words "Section 7 of the Act (T 50, L 16); it excepted (Ex. II (12), (13), (14), (15), (16), T 21) to the findings commencing with the words "At the end" (T 50, L 26) and ending with the words "during such period" (T 54, L 2); it excepted (Ex. II (17), T 21) to all the conclusions of law except conclusion No. 1 (T 54, L 7-12); and it excepted (Ex. II (18), T 21) to all the "Recommendations" of the Trial Examiner (T 56-60). A brief supporting the exceptions was filed with the Board. (T 22.) The Council participated in the oral argument before the Board on August 14, 1945 (T 22-23), and following the Board's decision and order on September 12, 1945 (T 22-30), it petitioned for a rehearing (T 63-68) which was denied (T 68-71). The Council answered the petition herein for enforcement of the order. (T 421-425.)

In stating the facts, the Council will be mindful of what this court said in *N. L. R. B. v. J. G. Boswell Co.*, 9 Cir. 1943, 136 F2d 585, at pages 589 and 590:

"All that the Act requires to sustain the Board's findings is that they be supported by substantial evidence. Our Rule 20 simplifies the presentation of the respondents' case, both for the respondents and the court. If the Board's statement of fact is not sufficient to sustain the findings, the respondents' brief, in effect, may demur to it. If suffi-

cient, it may be attacked by showing that the portions of the record referred to do not support the Board's statement."

And the Council will also be mindful of what this court said in *N. L. R. B. v. Grower-Shipper Veg. Assn.*, 9 Cir. 1941, 122 F2d 368, at page 375 and 376:

"Findings of the Board are conclusive only when supported by 'substantial evidence' which means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. *Edison Co. v. Labor Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126. Evidence which is unsubstantial in a jury case or court, does not become substantial merely because it is before the Board, for the evidence required to support the Board's findings 'must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board v. Columbian Co.*, 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660. 'Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room for doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning v. Cooley*, 281 U.S. 90, 94, 50 S.Ct. 231, 233, 74 L.Ed. 720.

Here we think the evidence so overwhelmingly to the effect that respondents did not refuse to bargain, as to leave no room to doubt that fact, and that a reasonable mind would not accept the evidence of the mere fact of submitting a proposal as adequate to support a conclusion that respondents refused to bargain."

The Bay Cities Metal Trades Council, A. F. of L., has been continuously in existence since 1900 or 1901. (T 263.) In matters of collective bargaining it acts on behalf of affiliated unions whose members are engaged in the metal industry in the area of San Francisco Bay and its tributaries. (T 263-264.) Its secretary was A. T. Wynn and his assistant was Thomas A. Rotell. (T 238, 262.) Local 284 of the International Association of Machinists is one of the 26 local unions affiliated with the Council. (T 300, 315, 330.)

On January 2, 1945, the Council entered into a closed-shop contract with respondents doing business as Graham Ship Repair Co. (T 252, 361.) In the charges upon which the Board issued the complaint it was alleged that the contract was made on January 25, 1945 (T 1, 13), and in the complaint it was alleged that the contract was made on January 13, 1945 (T 6). The findings approved by the Board and its order thereon leave no doubt that the contract was made on January 2, 1945. (T 23-28.)

The contract of January 2, 1945, was made by respondents through their agent Raymond H. Lehaney. (T 238.) They had employed him as Public Relations Manager for the Graham Ship Repair Company. (T 121, 258, 259, 353.) His experience in labor relations was wide. (T 121.) He was also Public Relations Director for the Western Congress of the International Brotherhood of Teamsters, Warehousemen, Chauffeurs and Helpers of America, AFL. (T 121-123, 352.) His authority to make the contract was

plenary and plenarily exercised. (T 131, 239, 259, 261, 276, 315, 350, 358, 378.) Petitioner does not assert the contrary.

The ship yard leased by respondents began operating on January 1, 1945. (T 118, 119.) Petitioner is in error in stating in its brief (p. 5) that respondents did not begin operating until January 3, 1945. No obligations of their predecessor or predecessors were assumed by respondents. (T 25.) Respondents had previously operated in the East under a closed-shop AFL agreement. (T 125.) When they began operating in the West with a Labor Relations Manager aligned with the AFL, it is reasonable to suppose that they again contemplated operating under a closed-shop AFL agreement. The record is inevitable in its conclusion that the contract signed by their Labor Relations Manager on January 2, 1945, was of that character. Before the contract was signed he was told by officers of the Council that it was under no duty to supply man power of any kind to the respondents and would only do so if the respondents agreed to a closed-shop AFL agreement for all the crafts affiliated with the Council including machinists. (T 259, 261, 266.) This was confirmed by Lehaney the Labor Relations Manager. (T 358.) And after the contract of January 2, 1945, was signed both Lehaney and the Council insisted that the agreement they had made extended to all crafts and included machinists. (T 272, 275, 276, 277, 294, 360, 363.)

On January 2, 1945, the day the contract was signed and the day after operations began, the respondents

had 8 employees at the yard none of whom was a machinist. (T 194, 345.) The expansion in employees was rapid. For the week ending January 7, 1945, the employees numbered 50; for the week ending January 14, 1945, they numbered 133; for the week ending January 21, 1945, they numbered 181; and for the week ending January 28, 1945, they numbered 309; and for the week ending February 2, 1945, they numbered 412. (T 139.) The expansion in machinists was also marked. It commenced with 3 on January 3, 1945, and had increased to 14 by January 25, 1945. (T 345.) A count of machinists at the yard on January 25, 1945, disclosed 32 or 33 machinists, 14 of whom were CIO machinists and the balance AFL machinists. (T 367.)

The record makes it apparent that the labor troubles over machinists at the ship yard of the respondents was the result of clashing viewpoints on the part of their executives. (T 363-364, 378.) But contrary to the findings of the Trial Examiner (T 50-51) and the assertions in the brief for petitioner (p. 7) to the effect that respondents discharged the CIO machinists, the record establishes that respondents did not discharge them (T 132, 138). This is conceded in the decision and order of the Board. (T 26-27.)

The vital findings made by the Trial Examiner and adopted by the Board (T 23) were (1) that the respondents did not intend to have the machinists covered by the closed-shop contract of January 2, 1945, and (2) that on and after January 2, 1945, the CIO union represented a majority in an appropriate union

of machinists. In its decision and order the Board added (3) that in any event a unit of production and maintenance employees, including machinists, would be inappropriate. (T. 23-24.)

The Council's arguments will be presented under the following headings:

1. The finding that the respondents did not intend to have the machinists covered by the closed-shop contract of January 2, 1945, is not supported by substantial evidence.
2. The finding that a unit of production and maintenance employees, including machinists, would be inappropriate, is not supported by substantial evidence.
3. The finding that on and after January 2, 1945, the CIO union represented a majority in an appropriate unit of machinists, is not supported by substantial evidence.

1. **THE FINDING THAT THE RESPONDENTS DID NOT INTEND TO HAVE THE MACHINISTS COVERED BY THE CLOSED-SHOP CONTRACT OF JANUARY 2, 1945, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

It may not be doubted that when the Labor Relations Manager of the respondents came to the Council late in December 1944 (T 354) and announced the intention of his employers to open a ship yard on January 1, 1945, the Council was not obligated, contractually or otherwise, to furnish the respondents with man power. Nor may it be doubted that the CIO did not have trade union territorial sovereignty

in the San Francisco Bay area over man power represented by machinists employed or to be employed in ship yards. The Council was asked by the Labor Relations Manager to state the terms upon which it would supply the respondents man power. It stated those terms and told him that it would require a closed-shop AFL agreement for all the crafts affiliated with the Council including machinists. Those terms were accepted by the Labor Relations Manager on behalf of the respondents, and the contract of January 2, 1945, was made to carry out those terms. His authority was plenary and plenarily exercised. His testimony is unequivocal that such was the intention of the contract. Unequivocally to the same effect is the testimony of those participating in the making of the contract on behalf of the Council. On the record, therefore, the evidence upon the issue is so overwhelmingly on one side as to leave no room for doubt that the fact is that respondents through their agent, the Labor Relations Manager, and the Council, through its officers, did intend to have the machinists covered by the closed-shop contract of January 2, 1945.

Viewing the record in the light most favorable to the petitioner on the issue, all that can be said is that other executives of the respondents or perhaps the respondents personally might have made a contract narrower in scope, and that reasons of expediency might have prompted a narrowing process. But the proper function of the Board was to consider the contract as made by those actually and actively

participating in its making rather than as it might have been made by others who did not actually and actively participate in its making. On the record, therefore, there is no substantial evidence to support the finding here challenged.

2. THE FINDING THAT A UNIT OF PRODUCTION AND MAINTENANCE EMPLOYEES, INCLUDING MACHINISTS, WOULD BE INAPPROPRIATE, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Upon a review of the Intermediate Report of the Trial Examiner, the Board apparently became doubtful that the evidence was sufficient to support the finding discussed in the preceding subdivision and it thereupon added the finding now under discussion. (T 23-24.)

The Council appreciates, of course, that the Board has a wide discretion in determining whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof". (29 U.S.C.A., sec. 159 (b).) That discretion is abused, however, if the determination be arbitrary or capricious. (*N. L. R. B. v. Sunshine Mining Co.*, 9 Cir. 1940, 110 F. 2d 780, 789; *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 6 Cir. 1945, 146 F. 2d 718, 720.) A manifest abuse of discretion is here reflected.

The Board will not deny that machinists are properly classified as maintenance and production employees. Nor will the Board deny that on repeated

occasions it has determined that a unit of production and maintenance employees is appropriate. *Timm Aircraft Co.*, 1943, 48 N.L.R.B. 503, is illustrative. Therefore in the present case it cannot be said that it was inherently inappropriate for the parties to the contract of January 2, 1945, to create a unit which included machinists along with other production and maintenance employees all affiliated with the AFL. That the parties to the contract of January 2, 1945, intended to create a unit of that character, has already been demonstrated. Why, then, should it be held that the unit was inappropriate? The Board was apparently motivated to this holding by the assumption that when the AFL contract of January 2, 1945, was made, a unit of CIO machinists was already functioning at the ship yard of the respondents, and by the fact that in other ship yards in the area CIO machinists were recognized as a separate and appropriate unit.

The Board's assumption was erroneous. According to the record the AFL closed-shop contract of January 2, 1945, was made the day before any CIO machinists were employed by respondents. What is plain, moreover, is that they were employed in violation of the contract which obligated the respondents to employ AFL machinists. In essence, therefore, the Board has held that CIO machinists employed in violation of a closed-shop AFL contract, assume the dignity of an appropriate unit which defeats or destroys the AFL contract and renders inappropriate the unit thereby created and which would have been appro-

priate but for the violation of the contract. That the determination is arbitrary, capricious, and an abuse of discretion, is obvious.

The fact that in other ship yards in the area CIO machinists were recognized as a separate and appropriate unit, is not controlling. Such units neither existed nor persisted in violation of closed-shop contracts. Their recognition therefore served to promote the national welfare. The situation here is different. Certainly it must here be said that the national welfare was not promoted by the action of the Board in encouraging and approving the violation of the closed-shop contract of January 2, 1945, and setting up in a ship yard during a time of national peril a small and separate unit for a rival union when the contract stipulated the contrary. Surely under such circumstances the national welfare could only be promoted by enforcing the contract and deeming as the appropriate unit the one which would eliminate jurisdictional disputes between rival unions during a time of national peril. The determination of the Board, it is repeated, is arbitrary, capricious, and an abuse of discretion.

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3. **THE FINDING THAT ON AND AFTER JANUARY 2, 1945, THE CIO UNION REPRESENTED A MAJORITY IN AN APPROPRIATE UNIT OF MACHINISTS, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

In earlier parts of this brief it has been demonstrated that no machinists were employed by the respondents until after January 2, 1945. The finding

to the contrary is therefore unsupported by the evidence. What was said in the preceding subdivision has equal application here. It was there demonstrated that the unit of production and maintenance employees, including machinists, would be appropriate. This would destroy the finding that the CIO machinists constituted an appropriate unit. And the preceding subdivision made it clear that the national welfare during a time of national peril was not promoted by the actions of the Board in designating the CIO machinists as an appropriate unit. It was held in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 6 Cir. 1945, 146 F. 2d 718, 722, that in time of national peril "the preservation, protection and promotion of the national welfare is the paramount objective", and that an order designating an "appropriate unit" will not be enforced in the absence of a finding that such unit was "selected in deference to the imperative public interests". No finding of that character was here made. The conclusion is therefore confirmed that the determination was arbitrary, capricious, and an abuse of discretion.

Finally, the case calls for an application of the doctrine of "expanding unit" to which the Board is committed. (*Solar Aircraft Company*, 1943, 48 N. L. R. B. 242.) This doctrine is to the effect that no exclusive recognition may be accorded to a union representing an "expanding unit" and that an employer may not enter into a collective bargaining agreement with a union representing a majority of the employees in such "expanding unit" until the unit represents

50% or more of a normal complement of the number which an employer contemplates hiring.

It is very apparent from all the evidence in this case that the employer intended to, and did, hire a great many more machinists than three. Reference has been earlier made to evidence showing the expanding number of machinists between January 3, 1945, and January 25, 1945, and disclosing that a count of machinists at the ship yard on January 25, 1945, showed 32 or 33 machinists of which 14 were CIO and the balance AFL. In holding that the three CIO machinists employed on January 3, 1945, constituted an "appropriate unit" the Board did violence to its doctrine of "expanding unit". And under that doctrine the finding that the CIO machinists constituted an "appropriate unit" is destroyed.

CONCLUSION.

The Council therefore respectfully submits that the petition to enforce the order should be denied.

Dated, San Francisco,

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